

Georgia v. Ashcroft: It's the End of Section 5 As We Know It (And I Feel Fine)

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TABLE OF CONTENTS

- I. THE SECTION 5 STANDARD PRIOR TO *GEORGIA*:
RETROGRESSION AND (JUST ABOUT) NOTHING BUT
RETROGRESSION
 - A. *The Effects Prong and the Retrogression Standard*
 - B. *"Clear" Violations of Section 2 and the Purpose Standard*
- II. WHY THE PRE-*GEORGIA* RETROGRESSION STANDARD
PRESENTED A PROBLEM FOR SECTION 5'S FUTURE
 - A. *The Court's Upholdings of Section 5 as a Proper Exercise
of Congressional Enforcement Power*
 - B. *Section 5's Problem: The Court's Recent Decisions*
- III. *GEORGIA* AND THE NEW STANDARD FOR RETROGRESSION
 - A. *Georgia at the District Court*
 - B. *The Supreme Court's Creation of a New Test for
Retrogression*
 - C. *The Supreme Court's (Rough) Application of Its New
Standard*
- IV. *GEORGIA* AS A SOLUTION FOR THE SEPARATION OF POWERS

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DEFICIENCIES OF SECTION 5

- A. *The Structure of the New Retrogression Test and the Court's Rough Application of that Test to Georgia's Senate Plan*
- B. *The Totality of the Circumstances Test*
- C. *Closer To, But Not Exactly, A Constitutional Discriminatory Purpose*

V. CONCLUSION

For several decades, Section 5 of the Voting Rights Act has prevented certain state and local governments from implementing any voting change, such as a redistricting plan, until the federal government determines that the change does not discriminate on the basis of race, color, or membership in a language minority group.¹ But this hallmark² civil rights remedy has its troubles. It expires in 2007.³ And while there is a good chance Congress will once again extend the life of Section 5,⁴ as it has on three prior occasions,⁵ it is less likely the Supreme Court will once again uphold the statute as constitutional.⁶

Doubt exists about the constitutionality of an extension of Section 5 because it is a law passed under the auspices of Congress's Fourteenth and Fifteenth Amendment enforcement power.⁷ At one time, that enforcement power gave Congress broad latitude to do just about whatever it wished when it came to passing civil rights legislation.⁸ The Court, however, has

1. 42 U.S.C. § 1973c; *Shaw v. Reno*, 509 U.S. 630, 634 (1993) (describing a redistricting plan as a voting change subject to Section 5).

2. See Scott Gluck, *Congressional Reaction to Judicial Construction of Section 5 of the Voting Rights Act of 1965*, 29 COLUM. J.L. & SOC. PROBS. 337, 340 (1996) (calling Section 5 the "single most important provision of the Voting Rights Act and the key to preventing electoral discrimination").

3. 42 U.S.C. § 1973b(a)(8).

4. See 150 CONG. REC. S1649-55 (daily ed. Feb. 26, 2004) (recording debate of amendment sponsored by Senator Bill Frist, R-Tenn., that would permanently extend Section 5).

5. Section 5 was extended in 1970, 1975, and 1982. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, §§ 2, 5, 84 Stat. 314, 314-15 (1970); Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, §§ 204, 206, 405, 89 Stat. 402, 402-04 (1975); Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2, 96 Stat. 131, 132-34 (1982).

6. The Court has upheld the constitutionality of Section 5 on four occasions. *Lopez v. Monterey County*, 525 U.S. 266 (1999); *City of Rome v. United States*, 446 U.S. 156 (1980); *Georgia v. United States*, 411 U.S. 526 (1973); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

7. U.S. CONST. amend. XIV (stating that "[t]he Congress shall have the power to enforce, by appropriate legislation, the provisions of this article"); U.S. CONST. amend. XV (stating that "[t]he Congress shall have power to enforce this article by appropriate legislation"). At numerous places throughout the Voting Rights Act, Congress explicitly states that the Act is enforcing the "guarantees of the fourteenth or fifteenth amendment." See, e.g., 42 U.S.C. § 1973a(c); see also Richard A. Williamson, *The 1982 Amendments to the Voting Rights Act: A Statutory Analysis of the Revised Bailout Provisions*, 62 WASH. U. L.Q. 1, 2 (1984) (describing the Act as "enacted under the legislative authority conferred by section 5 of the fourteenth amendment, [and] section 2 of the fifteenth amendment").

8. See, e.g., *Katzenbach v. Morgan*, 384 U.S. 641 (1966); see also Geoffrey Landward, Board of Trustees of the University of Alabama v. Garrett and the Equal Education Opportunity Act: Another Act Bites the Dust, 2002 BYU EDUC. & L.J. 313, 318 (noting that Congress had "seemingly

changed the ballgame in the past few years by seriously scaling back Congress's ability to exercise that power.⁹ While there are a number of intricacies to the Court's jurisprudence in this area, the desire to scale back Congress's power is partly guided by separation of powers concerns in that the Court seeks to decisively secure its role as the final arbiter in defining the parameters of constitutional law. In other words, the Court endeavors to prevent Congress from passing any statute that amounts to a wholesale change of a constitutional standard previously handed down by the Court.¹⁰

Prior to the Court's decision in *Georgia v. Ashcroft*,¹¹ this doctrinal shift presented a problem for Section 5.¹² The Constitution only protects against purposeful racial discrimination in voting.¹³ Section 5, however, primarily served to protect minority voters from voting changes that had a

limitless" enforcement power in 1990).

9. See *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *United States v. Morrison*, 529 U.S. 598 (2000); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999); *City of Boerne v. Flores*, 521 U.S. 507 (1997); see also Robert C. Post & Reva B. Siegel, *Equal Protection By Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 445 (2000) (describing how recent Court decisions "impose[d] new and substantial restrictions on Congress's power to enact antidiscrimination laws under [its enforcement power]"); David S. Day, *New Dimensions of the Section 5 Enforcement Power*, 47 S.D. L. REV. 366, 384 (2002) (describing how recent Court decisions have "recast" the standard for judging Congress's exercise of its enforcement power from "the deferential rational basis test to the non-deferential, searching scrutiny standard"). But see *Tennessee v. Lane*, 124 S. Ct. 1978 (2004); *Nevada Dept. of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

10. See, e.g., *Boerne*, 521 U.S. at 519 (describing how Congress does not have "the power to determine what constitutes a constitutional violation"); see also *Hibbs*, 123 S. Ct. at 1977 ("City of Boerne also confirmed, however, that it falls to this Court, not Congress, to define the substance of constitutional guarantees."); *Garrett*, 531 U.S. at 365 ("City of Boerne also confirmed, however, the long-settled principle that it is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees."); *Kimel*, 528 U.S. at 81 ("The ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch."); David Cole, *The Value of Seeing Things Differently: Boerne v. Flores and Congressional Enforcement of the Bill of Rights*, 1997 SUP. CT. REV. 31, 34 (1997) (describing how, under *Boerne*, "the Constitution has a determinate meaning that only the Supreme Court can divine, and if Congress deviates from the Court's substantive understanding in any way, its actions are *per se* invalid") (emphasis added); Post & Siegel, *supra* note 9, at 454 (asserting that "what really seems to be at stake" for the Court is "the preservation of judicial control over the ultimate meaning of the Constitution").

11. 539 U.S. 461 (2003).

12. Other commentators have noted the difficulty presented to Section 5 by the Court's recent decisions concerning the scope of Congress's enforcement power. See Victor Andres Rodriguez, Comment, *Section 5 of the Voting Rights Act of 1965 After Boerne: The Beginning of the End of Preclearance?*, 91 CAL. L. REV. 769, 774 (2003) (asserting that "there is reason to be concerned that the constitutional basis for broad remedial measures like Section 5, which is authorized under Congress' Fifteenth Amendment enforcement power, is newly vulnerable to attack"); see generally Paul Winke, *Why the Preclearance and Bailout Provisions of the Voting Rights Act Are Still A Constitutionally Proportional Remedy*, 28 N.Y.U. REV. L. & SOC. CHANGE 69 (2003) (discussing the Court's treatment of Section 5).

13. *City of Mobile v. Bolden*, 446 U.S. 55 (1980) (plurality opinion).

discriminatory effect.¹⁴ Thus, Section 5 arguably represented a change of the constitutional standard that contravened the Court's view of what separation of powers meant in the context of Congress's use of its enforcement power.

Enter *Georgia*. At first impression, the decision merely provides another unremarkable example of the Court's recent desire to curb federal authority over state and local governments¹⁵ as the decision primarily seems designed at making it easier for those entities to garner Section 5 approval for their voting changes.¹⁶ For this reason, *Georgia* may well provide less protection for minority voters because it reduces the ability of the federal government to prevent discrimination in the electoral process.¹⁷ After all, this "unique and stringent"¹⁸ statute came into existence because state and local governments often actively engaged in flagrant acts of voting-related racial bias.¹⁹

14. *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000).

15. See, e.g., *Printz v. United States*, 521 U.S. 898 (1997); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *United States v. Lopez*, 514 U.S. 549 (1995); *New York v. United States*, 505 U.S. 144 (1992); see also Vikram David Amar, *The New "New Federalism,"* 6 GREEN BAG 2D. 349, 349 (2003) (describing how "[f]or the past decade and a half, the Rehnquist Court has been making its historical mark by striking the balance between federal and state powers").

16. *Session v. Perry*, 298 F. Supp. 2d 451, 485 (E.D. Tex. 2004) (three-judge panel) (explaining that *Georgia* "gave states greater latitude in complying with the Voting Rights Act"); *The Supreme Court, 2002 Term*, 117 HARV. L. REV. 469, 478 (2003) (noting that *Georgia* makes it "far easier for states to obtain section 5 preclearance"); see also Ellen D. Katz, *Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 MICH. L. REV. 2341, 2381 (2003) (remarking that *Georgia* "cedes to covered jurisdictions discretion unprecedented within the preclearance process to shape their electoral districts"); Jeffrey McMurray, *Georgia Case Redefines Rules on Black Districts*, HOUSTON CHRONICLE, June 27, 2003, at 14 (describing how *Georgia* provides states with "more leeway" in redistricting).

The *Georgia* opinion does not explicitly admit to making it easier for state and local governments to get federal approval of voting changes. Rather, this purpose is implied from the language of the opinion where, for the first time, the Court emphasizes how Section 5 gives states a certain amount of "flexibility" in meeting the standard for federal approval. *Georgia v. Ashcroft*, 539 U.S. 461, 480-81 (2003) (allowing that Section 5 "does not dictate" that a State choose one method of redistricting but rather "gives States the flexibility" to choose how to provide effective representation to minority voters); *id.* at 483 (describing how Section 5 "leaves room for States to use" different types of districts to allow for minority representation); *id.* at 489 (noting how "Section 5 gives States the flexibility to implement the type of plan that *Georgia* has submitted for preclearance").

17. *Id.* at 494 (Souter, J., dissenting) (arguing that the majority opinion "substantially diminished" the requirement that jurisdictions adopt non-retrogressive voting changes).

18. Laughlin McDonald, *The Quiet Revolution in Minority Voting Rights*, 42 VAND. L. REV. 1249, 1250 (1989).

19. The history surrounding the passage of Section 5 of the Voting Rights Act has often and thoroughly been explained. See, e.g., Laughlin McDonald, *The 1982 Extension of Section 5 of the Voting Rights Act of 1965: The Continued Need for Preclearance*, 51 TENN. L. REV. 1 (1983). While it is not my intention to ignore this history or diminish its importance, another lengthy explication would add little to Section 5 scholarship.

In a nutshell, the Act was passed against the backdrop of extreme resistance, mostly in Southern States, to African-American voter registration. See, e.g., *United States v. Alabama*, 192 F. Supp. 677, 679-81 (M.D. Ala. 1961) (describing the discriminatory application of literacy tests in Macon County). The Attorney General tried to put an end to these discriminatory tactics; however, the time-consuming nature of litigation made for slow progress in achieving fair access to registration for African-Americans. *Hearings on S. 1564 Before Senate Committee on the Judiciary*,

But while *Georgia* could have a negative result for minority voters because less protection against voting discrimination may be provided, *Georgia* does contribute something positive to Section 5's future. For the Court has, through *Georgia*, created a substantive standard that helps conform the statute to the Court's recent pronouncements on the scope of Congress's enforcement power as it relates to separation of powers concerns. This is because *Georgia* moves Section 5 away from focusing purely on discriminatory effects, making it possible to persuasively contend that Section 5 no longer represents a wholesale change of the constitutional standard by Congress, but instead involves a standard that more closely approaches the constitutional norm for voting discrimination that has previously been handed down by the Court.²⁰

Before moving on, however, a couple of prefatory explanations on the purpose and scope of this Article. First, this Article should not be read as either an endorsement or criticism of the *Georgia* opinion. The opinion is what it is. Plenty of academic commentary will most certainly ensue claiming *Georgia* is rightly or wrongly decided.²¹ Rather than criticizing or championing the opinion, this Article seeks to harmonize *Georgia* with the Court's more general framework for judging the propriety of congressional civil rights remedies—to find what critics of the opinion might term a silver lining in the *Georgia* cloud.

Second, even though *Georgia* creates a substantive Section 5 standard that does not violate separation of powers principles, that was not (and is

89th Cong. 9-14 (1966) (statement of Attorney General Nicholas B. Katzenbach) (discussing length of time necessary to obtain judicial relief in voting cases). Moreover, even when the Attorney General won relief and secured a court injunction against a particular discriminatory voter registration practice, state and local governments would adopt a new discriminatory device not covered by the injunction. Armand Derfner, *Vote Dilution and the Voting Rights Act Amendments of 1982*, in MINORITY VOTE DILUTION 149 (Chandler Davidson ed., 1984) (describing how new discriminatory tools would be implemented within a day of the elimination of previous discriminatory tools). Section 5 was enacted to freeze voting laws into place so that once a discriminatory device was successfully challenged, a new discriminatory device could not be implemented. As the Senate Judiciary Committee noted in 1982:

Following the dramatic rise in registration, a broad array of dilution schemes were employed to cancel the impact of the new black vote. Elective posts were made appointive; election boundaries were gerrymandered; majority runoffs were instituted to prevent victories under a plurality system; at-large elections were substituted for election by single-member districts, or combined with other sophisticated rules to prevent an effective minority vote. The ingenuity of such schemes seems endless. Their common purpose and effect has been to offset the gains made under the ballot box under the Act. Congress anticipated this response. The preclearance provisions of Section 5 were designed to halt such efforts.

S. REP. NO. 97-417, at 6 (1982), reprinted in 1982 U.S.C.A.N. 177, 183.

20. I first took up this idea in a footnote in a previous Article. See Michael J. Pitts, *Section 5 of the Voting Rights Act: A Once and Future Remedy?*, 81 DENV. U. L. REV. 225, 281 n.273 (2003).

21. Compare Richard H. Pildes, *Less Power, More Influence*, N.Y. TIMES, Aug. 2, 2003, at A15 (praising *Georgia*), with Lani Guinier, *Saving Affirmative Action*, VILLAGE VOICE, July 2, 2003, at 46 (criticizing *Georgia*).

not) the entire breadth of the problem that the Court's enforcement power doctrine presents for the future of Section 5. The Court's doctrine in this area is also motivated by federalism concerns;²² and while *Georgia* does in some manner reduce the federal government's power over state and local governments,²³ it does so in a relatively small way. To put it more concretely, *Georgia* makes no reduction in the number of state and local governments subject to Section 5, does not reduce the types of voting changes that must receive federal approval, and does nothing to make it easier for state and local governments covered by Section 5 to escape the grip of the statute's coverage.²⁴ Changes that, in my opinion, Congress may need to make to conform Section 5 to the Court's federalism values.²⁵

I. THE SECTION 5 STANDARD PRIOR TO *GEORGIA*: RETROGRESSION AND (JUST ABOUT) NOTHING BUT RETROGRESSION

Section 5 prevents certain state and local governments²⁶ from implementing any change affecting voting,²⁷ no matter how minor,²⁸ until

22. See Ann Althouse, *Vanguard States, Laggard States: Federalism and Constitutional Rights*, 152 U. PA. L. REV. 1745, 1787 (2004) (describing how "*City of Boerne* primarily seems to express separation of powers values . . . [b]ut *City of Boerne* also involved federalism values"); Cole, *supra* note 10, at 37 (describing the twin motivations of *Boerne*); see also Day, *supra* note 9, at 371 (noting that "there are two aspects to the *Flores* decision: the federalism aspect and a separation of powers aspect") (internal quotations omitted).

23. See *supra* note 16 and accompanying text.

24. See generally *Georgia v. Ashcroft*, 539 U.S. 461 (2003).

25. See generally Pitts, *supra* note 20 (detailing the federalism problems created by an extension of Section 5).

26. Section 5 applies to all or parts of sixteen states. Covered in their entirety are the states of Alaska, Alabama, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia; partially covered are the states of California, Florida, Michigan, New Hampshire, New York, North Carolina, and South Dakota. 28 C.F.R. § 51.67 tbl. (2003) (Jurisdictions Covered Under Section 4(b) of the Voting Rights Act, As Amended).

27. Changes affecting voting include, but are not limited to, the following examples:

- (a) Any change in qualifications or eligibility for voting.
- (b) Any change concerning registration, balloting, and the counting of votes and any change concerning publicity for or assistance in registration or voting.
- (c) Any change with respect to the use of a language other than English in any aspect of the electoral process.
- (d) Any change in the boundaries of voting precincts or in the location of polling places.
- (e) Any change in the constituency of an official or the boundaries of a voting unit (e.g., through redistricting, annexation, deannexation, incorporation, reapportionment, changing to at-large elections from district elections, or changing to district elections from at-large elections).
- (f) Any change in the method of determining the outcome of an election (e.g., by requiring a majority vote for election or the use of a designated post or place system).
- (g) Any change affecting the eligibility of persons to become or remain candidates, to obtain a position on the ballot in primary or general elections, or to become or remain holders of elective offices.
- (h) Any change in the eligibility and qualification procedures for independent candidates.
- (i) Any change in the term of an elective office or an elected official or in the offices that are elective (e.g., by shortening the term of an office, changing from election to appointment or staggering the terms of offices).
- (j) Any change affecting the necessity of or methods for offering issues and propositions for approval by referendum.

federal approval has been obtained.²⁹ Federal approval, commonly known as “preclearance,” can come in the form of a declaratory judgment from the United States District Court for the District of Columbia³⁰ or through administrative approval by the Attorney General.³¹ Regardless of the federal entity involved, the substantive standard is the same: Section 5 requires a state or local government to meet its burden³² of proving that a voting change “does not have the *purpose* and will not have the *effect* of denying or abridging the right to vote on account of race or color or [membership in a language minority group].”³³ Thus, we turn to the manner in which, prior to *Georgia*, the Supreme Court had interpreted the two prongs of the test, the effects prong and the purpose prong.

A. The Effects Prong and the Retrogression Standard

Prior to *Georgia*, the seminal case involving the Section 5 effects standard was *Beer v. United States*.³⁴ *Beer* involved a redistricting plan offered for federal approval by the City of New Orleans.³⁵ After the 1960

(k) Any change affecting the right or ability of persons to participate in political campaigns which is affected by a jurisdiction subject to the requirement of section 5.

28 C.F.R. § 51.13 (2003).

28. *Allen v. State Bd. of Elections*, 393 U.S. 544, 565-66 (1969) (finding that Congress intended Section 5 to “reach any state enactment which altered the election law of a covered State in even a minor way”).

29. *Clark v. Roemer*, 500 U.S. 646, 652-55 (1991) (requiring, with perhaps a minor exception, a federal court to enjoin implementation of any change that has not received federal approval); *Hathorn v. Lovorn*, 457 U.S. 255, 269 (1982) (observing that failure to obtain federal approval of a voting change “renders the change unenforceable”); *Connor v. Waller*, 421 U.S. 656 (1975) (*per curiam*) (describing how voting changes are legally ineffective until approved by a federal authority).

30. 42 U.S.C. § 1973c (allowing covered jurisdictions to “institute an action in the United States District Court for the District of Columbia for a declaratory judgment”).

31. *Id.* (allowing covered jurisdictions to enforce voting changes without a declaratory judgment if the change is “submitted . . . to the Attorney General and the Attorney General has not interposed an objection” to the change).

A jurisdiction can implement a change if the Attorney General fails to interpose an objection within sixty days of receiving submission of the change. *Id.* A change, therefore, can receive approval by the Attorney General’s silence. *See id.* However, the Attorney General has the statutory authority to affirmatively approve a change prior to the sixtieth day. *Id.* Indeed, the Attorney General’s practice is to always respond to a submission within sixty days (i.e., not to approve a change by silence) whether or not it is an approval or a rejection of the change. 28 C.F.R. § 51.42 (“It is the practice and intention of the Attorney General to respond to each submission within the 60-day period.”).

32. *Wilkes County v. United States*, 450 F. Supp. 1171, 1177 (D.D.C. 1978) (“In an action for a declaratory judgment under Section 5, the burden of proof is on the plaintiff.”); 28 C.F.R. § 51.52(a) (placing the burden of proof on the jurisdiction that submits the change to the Attorney General).

33. 42 U.S.C. § 1973c (emphasis added). The term “language minority group” applies to persons who are “American Indian, Asian American, Alaskan Native, or of Spanish heritage.” 42 U.S.C. § 19731(c)(3).

34. 425 U.S. 130 (1976).

35. *Id.* at 133.

Census, the City had five single-member council districts, one of which was comprised of an African-American total population majority and none of which was comprised of an African-American voter majority.³⁶ After the 1970 Census, the City sought a declaratory judgment for approval of a redistricting plan that created two districts with an African-American total population majority, one of which contained an African-American voter majority.³⁷

The district court denied approval to this plan because it did not meet the Section 5 effects standard.³⁸ The district court found that, for African-Americans to be proportionally represented, they would have to be able to elect three city council members.³⁹ Yet the proposed redistricting plan would only allow African-Americans to elect one councilmember.⁴⁰ So, largely because of this divergence between proportional representation and what sort of representation the proposed plan would actually allow African-Americans, the plan had an impermissible discriminatory effect that precluded federal approval.⁴¹

The Supreme Court reversed.⁴² In doing so, it created the "retrogression" test.⁴³ This test only allowed the federal government to deny approval to a voting change under the effects prong of Section 5 when the change "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."⁴⁴ In other words, the federal government had to approve any voting change that did not make minority voters worse off than they were before the change.⁴⁵ And, applying this "straightforward" standard, city officials' redistricting plan complied with the Section 5 effects prong because the new plan contained an additional district with an African-American voter majority.⁴⁶ Thus, the additional district made the new plan ameliorative, not retrogressive, for

36. *Id.* at 135.

37. *Id.* at 136. The City sued in the district court after the Attorney General twice denied administrative approval. *Id.* at 130. The City initially redrew the district boundaries and, in doing so, created two districts that had an African-American total population majority, but did not create any district with an African-American voter majority. *Id.* at 135. This initial redistricting plan was rejected by the Attorney General because the plan diluted African-American voting strength by "combining a number of black voters with a larger number of white voters in each of the five districts." *Id.* City officials then went back to the drawing board and submitted a second plan that became the subject of the litigation. *Id.* at 135-36. This second plan also failed to satisfy the Attorney General who denied approval because the manner in which the districts were drawn had the "effect of diluting the maximum potential impact of the Negro vote." *Id.* at 136.

38. *See id.*

39. *Id.*

40. *Id.* at 137.

41. *Id.* at 138.

42. *Id.* at 143.

43. *Id.* at 141.

44. *Id.*

45. *Id.* (reasoning that a "legislative reapportionment that enhances the position of racial minorities with respect to their effective exercise of the electoral franchise can hardly have the 'effect' of diluting or abridging the right to vote on account of race within the meaning of Section 5").

46. *Id.* at 141-42.

African-American voters.⁴⁷

So the *Beer* retrogression test produced a straightforward effects test for the effects prong of Section 5. If a change resulted in minority voters losing ground, then the change was not entitled to federal approval.⁴⁸ On the other hand, if the change retained the existing voting strength of minority voters or increased that voting strength, then the change merited federal approval.⁴⁹ A discriminatory purpose (or lack thereof) played no role in the Section 5 effects prong.⁵⁰ Motive did not matter.

Between the *Beer* decision in 1976 and the *Georgia* decision in 2003, the Supreme Court provided little additional guidance on how to determine whether a voting change retrogressed minority voting strength.⁵¹ Instead, implementation of the test largely fell upon the Attorney General through the administrative preclearance process.⁵² And in the context of redistricting and districting plans, which arguably comprise the most important voting changes that the federal government reviews,⁵³ the Attorney General's

47. *Id.* at 142.

48. 28 C.F.R. § 51.54(a) (2003).

A change affecting voting is considered to have a discriminatory effect under section 5 if it will lead to a retrogression in the position of members of a racial or language minority group (i.e., will make members of such a group worse off than they had been before the change) with respect to their opportunity to exercise the electoral franchise effectively.

Id.; see also *City of Lockhart v. United States*, 460 U.S. 125, 134 (1983) (preclearing voting changes because they "did not increase the degree of discrimination against [African-Americans]"); *Arizona v. Reno*, 887 F. Supp. 318, 320 (D.D.C. 1995) (describing how "any change which would place a protected minority group in a position worse than its position [under the existing system] . . . does not merit clearance"); *Texas v. United States*, 866 F. Supp. 20, 27 (D.D.C. 1994) (explaining how "preclearance [must] be denied under the 'effects' prong of Section 5 if a new system places minority voters in a weaker position than the existing system") (internal quotations omitted).

49. See *Lockhart*, 460 U.S. at 134; *Arizona*, 877 F. Supp. at 320; *Texas*, 866 F. Supp. at 27.

50. *Beer*, 425 U.S. at 141 (setting forth the retrogression standard).

51. As one commentator noted in the late 1990s, "Unfortunately, the courts have merely repeated the retrogression language from *Beer* without extensive analysis of what constitutes a retrogression. The Supreme Court typically states simple conclusions as to whether or not a change is a retrogression. Why a change does or does not constitute a retrogression is unclear." Frederick G. Slabach, *Race, Redistricting and Retrogression in Mississippi After the 2000 Census*, 68 *MISS. L.J.* 81, 87 (1998); see also Lindsay Ryan Errickson, Note, *Threading the Needle: Resolving the Impasse Between Equal Protection and Section 5 of the Voting Rights Act*, 54 *VAND. L. REV.* 2057, 2060 (2001) (observing that, as of 2001, the Supreme Court "ha[d] yet to define clearly how to measure whether a minority group is going to suffer more severe vote dilution under a proposed districting plan").

52. Jurisdictions covered by Section 5 rarely seek a declaratory judgment from the United States District Court for the District of Columbia; rather, the overwhelming number of voting changes are submitted for administrative approval by the Attorney General. U.S. Department of Justice, Civil Rights Division, Voting Section, *About Section 5 of the Voting Rights Act*, (Feb. 11, 2000), available at http://www.usdoj.gov/crt/voting/sec_5/types.htm (noting that the Attorney General reviews 99 percent of preclearance requests); Drew S. Days III, *Section 5 and the Role of the Justice Department*, in *CONTROVERSIES IN MINORITY VOTING* 53, 53 & n.2 (Bernard Grofman & Chandler Davidson eds., 1992) (noting how jurisdictions overwhelmingly choose the Attorney General as the avenue through which to gain approval of voting changes).

53. See Mark A. Posner, *Post-1990 Redistrictings and the Preclearance Requirement of Section*

implementation of the retrogression test most often amounted to the following process:

First, the Attorney General reviewed a plan to determine if there were any districts that allowed minority voters to elect candidates of choice—⁵⁴ in general, this amounted to a search for districts where minority voters controlled the outcome in a way that let them elect a candidate of their same race or language minority group;⁵⁵

Second, the Attorney General reviewed Census data to determine if any of these districts underwent a decrease in minority population;⁵⁶

Third, the Attorney General examined voting patterns to determine if any reductions in minority population would result in the likelihood that minority voters would no longer be able to elect a candidate of choice—crucial to this analysis was a determination of the level of racially polarized voting⁵⁷ while also taking into account the comparative registration and turnout rates of non-minority and minority voters;⁵⁸

Fourth, if it appeared minority voters had lost a district in which

5 of the Voting Rights Act, in RACE AND REDISTRICTING IN THE 1990S 80 (Bernard Grofman ed., 1998).

The drawing of districts from which officials are elected, whether through a redistricting or the adoption of a districting plan to implement a new district method of election, is one of the most important voting changes that a jurisdiction may adopt, and the review of redistrictings and districtings has been an integral part of Section 5 enforcement efforts from the beginning.

Id.

54. See Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, 66 Fed. Reg. 5412, 5413 (Jan. 18, 2001) [hereinafter *Guidance*] (“The effective exercise of the electoral franchise usually is assessed in redistricting submissions in terms of the opportunity for minority voters to elect candidates of their choice.”).

55. See *Georgia v. Ashcroft*, 539 U.S. 461, 481 (2003) (describing the likely electoral outcome in single-member districts that allow minority voters to elect a candidate of choice).

56. *Id.* (describing how “the important starting point of any retrogression analysis” was a comparison of Census statistics in the existing and proposed plans).

57. *Id.* (“The presence of racially polarized voting is an important factor considered by the Department of Justice in assessing minority voting strength.”).

Racially polarized voting, also known as racial bloc voting, occurs when non-minority voters strongly support one candidate and minority voters strongly support a different candidate. *Thornburg v. Gingles*, 478 U.S. 30, 53 n.21 (1986) (plurality opinion) (characterizing racially polarized voting as occurring when “black voters and white voters vote differently”); see also Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1112-13 (1991) (describing racial bloc voting as occurring when white voters do not vote for black candidates); Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1854-56 (1992) (discussing racially polarized voting).

58. *Guidance*, *supra* note 54, at 5413 (describing how “election history and voting patterns within the jurisdiction, voter registration and turnout information, and other similar information are very important to an assessment of the actual effect of a redistricting plan”).

they could elect a candidate of choice (i.e., a retrogression had occurred), the Attorney General determined whether an alternative plan could be created that would not result in the elimination of such a district.⁵⁹

After all this, if a plan resulted in an arguable⁶⁰ loss of a district in which minority voters could elect a candidate of choice and a non-retrogressive plan could be drawn, the Attorney General would deny approval; otherwise the plan was precleared.⁶¹

The Attorney General's denial of preclearance to a redistricting plan submitted by Macon, Georgia, in the mid-1990s, illustrates how this analysis worked. Macon's existing plan had five double-member districts, three of which had African-American population majorities.⁶² The proposed plan increased the African-American populations in two of those districts but decreased the population in the third district⁶³ from one with a majority African-American voting age population to one with a majority-white voting age population.⁶⁴ This, however, was unacceptable under Section 5 and approval was denied because there was racially polarized voting⁶⁵ and because the reduction was not necessary (i.e., the City could have drawn a plan that did not reduce the African-American voting age population).⁶⁶

59. *Id.* (describing how the Attorney General reviews alternative plans to determine if a viable remedy exists).

60. I use the term "arguable" because, in close cases, the Attorney General might deny approval if the submitting authority failed to meet his burden of proving the change did not violate Section 5. See *supra* note 32 and accompanying text (describing burden of proof); see also Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 STAN. L. REV. 731, 755 (1998) (describing how "the Attorney General resolves doubts about the racial fairness of a plan against the State").

61. *Guidance, supra* note 54, at 5413 ("A proposed redistricting plan ordinarily will occasion an objection by the Department of Justice if the plan reduces minority voting strength relative to the benchmark plan and a fairly-drawn alternative plan could ameliorate or prevent that retrogression.").

62. Letter from Loretta King, Acting Assistant Attorney General, Civil Rights, to Joan W. Harris, Esq., City Attorney (Dec. 20, 1994) [hereinafter *Letter from Loretta King*] (on file with author) ("Under the existing districting plan, three of the five districts now have substantial black population majorities."). While the Voting Rights Act nominally requires the Attorney General to make Section 5 determinations, the Attorney General has delegated responsibility for making these determinations to the Assistant Attorney General for Civil Rights. 28 C.F.R. § 51.3 (2003).

63. *Letter from Loretta King, supra* note 62 ("The proposed plan would increase the already substantial black majorities in two of these districts, but would substantially reduce the black population percentage in District 1.").

64. *Id.* ("District 1 would be transformed from one that has a significant black voting age population majority (58%) to one where whites would constitute a majority of the voting age residents.").

65. *Id.* ("In the context of a pattern of racially polarized voting, the plan thus would occasion a prohibited 'retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.'") (quoting *Beer v. United States*, 425 U.S. 130, 141 (1976)).

66. *Letter from Loretta King, supra* note 62 ("It is clear that the city council was aware, during the redistricting process, that alternative plans are available that would correct the population malapportionment in the existing plan, avoid any retrogression in electoral opportunity for black

So this is the manner in which the Attorney General implemented the effects prong after *Beer*.⁶⁷ If a change would have a negative impact on minority voters that could be remedied, the change would not receive approval; otherwise it would pass the retrogression test.⁶⁸ But for many years, federal approval or disapproval was not solely governed by retrogression because the Attorney General's review of voting changes included two other tools that could be used to deny preclearance: the "clear" violation of Section 2 and the purpose prong.

B. "Clear" Violations of Section 2 and the Purpose Standard

Beer limited the Section 5 effects prong by only allowing the federal government to prevent implementation of changes that made minority voters worse off.⁶⁹ For this reason, it might have appeared that Section 5 could not be used as a mechanism to eliminate existing electoral systems, such as at-large elections or districting plans, that did not provide an adequate opportunity for minority voters to elect a candidate or candidates of choice—systems that, in common parlance, resulted in "vote dilution."⁷⁰ Simply put, if the current electoral system inadequately reflected minority voting strength and the proposed change perpetuated inadequate minority representation, Section 5 could not be used to compel a jurisdiction to adopt something better for minority voters.⁷¹

However, after *Beer*, the Attorney General used Section 5 to eliminate existing vote dilution under two theories. First, Section 5 was used to prevent implementation of voting changes that resulted in a "clear" violation of Section 2 of the Voting Rights Act.⁷² Second, Section 5 was used to prevent voting changes that were adopted with an unconstitutional discriminatory purpose.⁷³ After all, *Beer*, in *dictum*,⁷⁴ suggested that a non-retrogressive redistricting plan would violate Section 5 if "the apportionment

voters, and adhere to other traditional districting principles.").

67. *Guidance*, *supra* note 54, at 5413.

68. *See supra* notes 54-59 and accompanying text.

69. *See supra* note 58 and accompanying text.

70. Vote dilution occurs when an electoral system limits minority voters' ability to "convert their voting strength into control of, or at least influence with, elected public officials." Richard L. Engstrom, *Racial Vote Dilution: The Concept and the Court*, in *THE VOTING RIGHTS ACT: CONSEQUENCES AND IMPLICATIONS* 14 (Lorn S. Foster ed., 1985). The paradigmatic example of vote dilution occurs when a cohesive minority voting bloc is submerged within a cohesive bloc of non-minority voters. CHANDLER DAVIDSON, *MINORITY VOTE DILUTION* 4 (Chandler Davidson ed., 1984).

71. *See Beer v. United States*, 425 U.S. 130, 141 (1976).

72. 28 C.F.R. § 51.55(b)(2) (1996). This standard was not actually employed until after the 1982 Amendments to the Voting Rights Act. *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 505-07 (1997) (Stevens, J., dissenting in part and concurring in part) (describing the interplay between the 1982 Amendments and the ability of the Attorney General to deny preclearance on the basis of a Section 2 violation).

73. *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 325 (2000); *Beer*, 425 U.S. at 141.

74. *Bossier Parish Sch. Bd.*, 528 U.S. at 338 ("In any event, it is entirely clear that the statement in *Beer* was pure dictum.").

itself so discriminates on the basis of race or color as to violate the constitution.”⁷⁵

For a number of years, this interpretation and enforcement by the Attorney General led to large gains in minority political participation.⁷⁶ However, during the 1990s round of redistricting, the Supreme Court weighed in on both these theories of enforcement in a pair of cases involving a redistricting plan adopted by the Bossier Parish School Board, Louisiana.⁷⁷ These decisions involved the Attorney General’s opposition to the Board’s implementation of a redistricting plan because it resulted in a “clear” violation of Section 2 and because it was adopted with an unconstitutional discriminatory purpose.⁷⁸ However, the Supreme Court rejected both of these bases for denying federal approval to a voting change.⁷⁹

The first trip to the Supreme Court for the Bossier Parish School Board’s redistricting plan involved the question of whether the federal government could refuse to approve a plan that would result in a “clear” violation of Section 2.⁸⁰ Since 1982, Section 2’s core function has been as a remedy to attack existing minority vote dilution, most often by replacing a dilutive at-large method of election with single-member districts, at least one of which would include a majority of minority population.⁸¹ The Attorney

75. *Beer*, 425 U.S. at 141; see also *Busbee v. Smith*, 549 F. Supp. 494, 516-18 (D.D.C. 1982) (three-judge panel), *aff’d*, 459 U.S. 1166 (1983) (finding that, although the redistricting was not retrogressive, it violated Section 5 because it was not “nondiscriminatory in purpose”).

76. See Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After Adarand and Shaw*, 149 U. PA. L. REV. 1, 136 (2000) (describing how the Attorney General’s vigorous enforcement of Section 5 led to “many new black-majority districts [being] formed at all levels of government”). Section 5 resulted in an increase in minority participation because many of the Attorney General’s denials of approval were to changes that did not retrogress minority voting strength. Brief on Reargument for the Federal Appellant at 13, *Bossier*, 528 U.S. 320 (Nos. 98-405, 98-406) (stating that, in the 1990s, more than 60% of the Attorney General’s 367 objections were not based on retrogression). True, denial of approval to a non-retrogressive change would not necessarily guarantee that a jurisdiction would adopt something better for minority voters. This is because, when the Attorney General prevents implementation of a change, Section 5 leaves in place the *status quo*. POSNER, *supra* note 53, at 87. However, as a practical matter, other constraints (such as the need to redistrict following release of decennial Census statistics to comply with the constitutional mandate of one person, one vote) would force jurisdictions to adopt changes that improved the position of minority voters. *Id.*

77. *Bossier Parish Sch. Bd.*, 528 U.S. at 320; *Bossier Parish Sch. Bd.*, 520 U.S. at 471.

78. The Attorney General initially denied preclearance through the administrative process and then opposed preclearance in a declaratory judgment action. *Bossier Parish Sch. Bd.*, 528 U.S. at 324-25.

79. *Bossier Parish Sch. Bd.*, 520 U.S. at 490; *Bossier Parish Sch. Bd.*, 528 U.S. at 341.

80. *Bossier Parish Sch. Bd.*, 520 U.S. at 474.

81. Chandler Davidson & Bernard Grofman, *The Voting Rights Act and the Second Reconstruction*, in *QUIET REVOLUTION IN THE SOUTH* 383-86 (Chandler Davidson & Bernard Grofman eds., 1994) (describing how, since the 1982 Amendment of Section 2, “numerous suits” have been filed against at-large election systems); Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1707 (1993) (describing how, after the 1982 Amendment of Section 2, the courts faced “literally thousands of challenges to election schemes that did not fairly reflect the voting strength of minority communities”).

General, however, primarily used a Section 2 analysis in its Section 5 review to force jurisdictions that already were using single-member districts⁸² to create additional majority-minority districts⁸³ or to compel jurisdictions who wished to expand existing at-large systems to switch to electoral systems that would allow minority voters to control the outcome in at least one single-member district.⁸⁴

The Bossier Parish School Board plan presented a situation where the Attorney General attempted to use Section 2 to force the creation of majority-minority districts when the jurisdiction already employed single-member districts.⁸⁵ Prior to 1990, the Board had twelve districts, but none of them had a population comprised of a majority of African-Americans.⁸⁶ After the 1990 Census revealed those districts to be malapportioned, the Board adopted a redistricting plan that once again failed to include any district with a majority of African-American population, even though it would have been possible for the Board to create two such districts.⁸⁷

The Attorney General refused to approve the plan because it amounted to a "clear" violation of Section 2.⁸⁸ But the Supreme Court rejected a violation of Section 2 as a valid basis for denying federal approval⁸⁹ because the two provisions of the Voting Rights Act were designed to attack two separate evils: Section 2 was designed to eradicate existing dilutive voting practices while Section 5 was designed to combat *changes* to existing systems that would result in a retrogression of minority voting strength.⁹⁰ To import Section 2 into Section 5 would impermissibly "shift the focus of [Section] 5 analysis from nonretrogression to vote dilution," "call into question more than 20 years of precedent interpreting [Section]5," and "increase further the serious federalism costs already implicated by §5."⁹¹ With that, the Court closed the book on one avenue the Attorney General had used to deny approval to non-retrogressive voting changes.⁹²

82. Section 2 applies to districting plans as well as at-large elections. *Grove v. Emison*, 507 U.S. 25, 40 (1993).

83. *See, e.g.*, Letter from John R. Dunne, Assistant Attorney General, Civil Rights, to Tiare B. Smiley, Esq., Special Deputy Attorney General, State of North Carolina (Dec. 18, 1991) (objecting, in part on Section 2 grounds, to failure to draw additional majority-minority districts); Letter from John R. Dunne, Assistant Attorney General, Civil Rights, to Mark H. Cohen, Senior Assistant Attorney General, State of Georgia (Jan. 21, 1992) (objecting, in part on Section 2 grounds, to failure to draw additional majority-minority districts).

84. *See, e.g.*, *Arizona v. Reno*, 887 F. Supp. 318 (D.D.C. 1995).

85. *Bossier Parish Sch. Bd.*, 520 U.S. at 475-76.

86. *Id.* at 474.

87. *Id.* at 475.

88. *Id.* at 475-76.

89. *Id.* at 485.

90. *Id.* at 479-80.

91. *Id.* at 480.

92. It should be noted that denials of federal approval based *solely* on the Section 2 rationale were relatively rare. The Section 2 rationale often worked in concert with a theory of discriminatory purpose. *See* Brief for the Federal Appellant at 40, *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471 (1997) (Nos. 98-405, 98-406) ("The facts relevant to vote dilution in violation of Section 2 are usually also relevant to purpose under Section 5."); *see also, e.g.*, Letter from Deval L. Patrick, Assistant Attorney General, Civil Rights, United States Department of Justice, to Hubbard T.

A few years later, the Board's redistricting plan returned to the Court.⁹³ The issue to be decided this time around was whether preclearance could be withheld if a voting change was adopted with a discriminatory, though non-retrogressive, purpose.⁹⁴ The question, put another way, was this: Could the federal government deny approval to a voting change adopted with an *unconstitutional* discriminatory purpose? The Court answered the question in the negative,⁹⁵ deciding the case almost purely as a matter of statutory interpretation.⁹⁶ In doing so, it rejected the *dictum* from *Beer* in which the Court had appeared to grant the Attorney General and the United States District Court for the District of Columbia the power it was now denying.⁹⁷ Instead, the Court held that federal approval could only be denied to changes with a *retrogressive* purpose.⁹⁸

The result of the *Bossier* decisions was that federal review of voting changes was left with little except for the retrogressive effects test.⁹⁹ Sure, retrogressive purpose, the functional equivalent of unconstitutional purpose, remained a factor in federal review because a purpose to make minority voters worse off would easily violate the Equal Protection Clause;¹⁰⁰ yet, as expected, retrogressive purpose has played only a very limited role in

Saunders IV, Special Counsel, Crosthwait Terney (Dec. 19, 1994) (objecting on both Section 2 and purpose grounds to proposed method of election and districting plan for the City of Quitman, Mississippi). In fact, the Attorney General had predicted that denials of federal approval based upon Section 2 would be rare when issuing the administrative guideline allowing for the denial of federal approval based on a violation of Section 2. Revision of Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 52 Fed. Reg. 486, 487 (Jan. 6, 1987) ("Our experience indicates that . . . it would be exceedingly rare that a jurisdiction would be able to satisfy its burden of proof imposed by Section 5 concerning a voting procedure . . . and still face the prospect that the same change violates amended Section 2.").

93. See *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000).

94. *Id.* at 322-23.

95. *Id.* at 341 (holding that "[Section] 5 does not prohibit preclearance of a redistricting plan enacted with a discriminatory but nonretrogressive purpose").

96. *Id.* at 328 (holding that the "language of [Section] 5 leads to the conclusion that the 'purpose' prong of [Section] 5 covers only retrogressive dilution"); *id.* at 336 (asserting that the most important reason for the Court's decision was the "language of [Section] 5"); *id.* at 341 ("In light of the language of [Section] 5 and our prior holding in *Beer*, we hold that [Section] 5 does not prohibit preclearance of a redistricting plan enacted with a discriminatory but nonretrogressive purpose.").

97. *Id.* at 335; see also *supra* notes 74-75 and accompanying text.

98. It is possible that the retrogressive purpose standard only applies to voting changes that have the potential for vote dilution and not to changes that have the potential to deny minority voters access to the ballot (i.e., changes in polling places and registration locations). See *Holder v. Hall*, 512 U.S. 874, 922 (1994) (Thomas, J., concurring) (describing types of voting practices that implicate ballot access). The Supreme Court has only definitively applied its holding in the second *Bossier* case to voting practices that could dilute minority votes. *Bossier Parish Sch. Bd.*, 528 U.S. at 337-38. This Article assumes this standard applies to all voting changes.

99. Alaina C. Beverly, Note, *Lowering the Preclearance Hurdle*: *Reno v. Bossier Parish School Board*, 5 MICH. J. RACE & L. 695, 699 (2000) (describing how the practical impact of the *Bossier* cases left retrogressive effect as the only means by which the federal government could prevent implementation of a voting change).

100. U.S. CONST. amend. XIV, § 1.

determining whether a voting change receives federal approval.¹⁰¹ In the three years that followed the Court's second *Bossier* decision, the Attorney General denied approval to only eleven changes in which retrogressive purpose played any kind of role—and in every one of those denials, actual retrogressive effect was also involved.¹⁰² So, after the *Bossier* decisions, Section 5 mostly amounted to a search for voting changes that had a discriminatory impact, leading to a problem for anyone attempting to justify the statute under the Court's latest idea of what constitutes an appropriate exercise of Congress's enforcement power.

101. In its submission to the Court in the second *Bossier*, the Solicitor General's office made this prediction:

Appellee's submission, however, would reduce the purpose prong of Section 5 to a trivial matter, limited to preventing enforcement of those voting changes that are intended to cause retrogression but are destined to fail in doing so (since any new voting practice that actually "will * * * have the effect" of retrogression will be denied preclearance under the effect prong.) The Court should reject a construction of Section 5 that would render its purpose prong so insignificant.

Brief on Reargument for the Federal Appellant at 13, *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000) (Nos. 98-405, 98-406).

102. Between January 24, 2000, (the day the second *Bossier* was decided) and January 24, 2004, the Attorney General denied preclearance on 34 occasions (not counting continued denials of preclearance). United States Department of Justice Civil Rights Division, Section 5 Objection Determinations (including text of objection letters), at http://www.usdoj.gov/crt/voting/sec_5/obj_activ.htm. Eleven of those preclearance denials involved retrogressive purpose. Letter from Ralph F. Boyd, Jr., Assistant Attorney General, Civil Rights Division, to John B. Duggan, Esq. (Nov. 2, 2001) (objecting to redistricting plan in Greer, South Carolina); Letter from Ralph F. Boyd, Jr., Assistant Attorney General, Civil Rights Division, to J. Lane Greenlee, Esq. (Dec. 11, 2001) (objecting to cancellation of general election in Kilmichael, Mississippi); Letter from Ralph F. Boyd, Jr., Assistant Attorney General, Civil Rights Division, to William D. Barr, Ed.D., Superintendent of Schools, Monterey County Office of Education (Apr. 1, 2002) (objecting to change to at-large elections for the Chualar Union Elementary School District, California); Letter from Ralph F. Boyd, Jr., Assistant Attorney General, Civil Rights Division, to William D. Sleeper, County Administrator, and Fred M. Ingram, Chairperson, Board of Supervisors (Apr. 29, 2002) (objecting to redistricting plan for Pittsylvania County, Virginia); Letter from Ralph F. Boyd, Jr., Assistant Attorney General, Civil Rights Division, to Lisa T. Hauser, Esq., and José de Jesús Rivera, Esq. (May 20, 2002) (objecting to redistricting plan for the State of Arizona); Letter from Ralph F. Boyd, Jr., Assistant Attorney General, Civil Rights Division, to Charles T. Edens, Chairperson, County Council (June 27, 2002) (objecting to redistricting plan in Sumter County, South Carolina); Letter from Ralph F. Boyd, Jr., Assistant Attorney General, Civil Rights Division, to The Honorable Bill Robertson, Mayor, and H. Gray Stothart II, Coordinating & Development Corporation (July 2, 2002) (objecting to redistricting plan for Minden, Louisiana); Letter from Ralph F. Boyd, Jr., Assistant Attorney General, Civil Rights Division, to Darvin Satterwhite, Esq., County Attorney (July 9, 2002) (objecting to redistricting plan for Cumberland County, Virginia); Letter from Ralph F. Boyd, Jr., Assistant Attorney General, Civil Rights Division, to C. Havird Jones, Jr., Esq., Senior Assistant Attorney General, South Carolina (Sept. 3, 2002) (objecting to redistricting plan for the Union County School District, South Carolina); Letter from J. Michael Wiggins, Acting Assistant Attorney General, Civil Rights Division, to Al Grieshaber, Esq., City Attorney (Sept. 23, 2002) (objecting to redistricting plan for Albany, Georgia); Letter from Andrew E. Lelling, Acting Assistant Attorney General, Civil Rights Division, to Walter C. Lee, Superintendent, Parish School Board, and B.D. Mitchell, President, Parish Police Jury (Dec. 31, 2002) (objecting to redistricting plan for DeSoto Parish School District, Louisiana).

II. WHY THE PRE-GEORGIA RETROGRESSION STANDARD PRESENTED A
PROBLEM FOR SECTION 5'S FUTURE

Today, the Section 5 effects prong provides the statute's primary mechanism of enforcement. But, prior to *Georgia*, the effects prong was just that—a pure effects test. In contrast, the Constitution protects citizens from the adoption and maintenance of *purposefully* discriminatory voting procedures.¹⁰³ This distinction presented little problem for Section 5 decades ago when it was easily upheld as a proper remedy under Congress's enforcement power.¹⁰⁴ Now, however, new challenges confront Congress's ability to exercise its enforcement power and, vicariously, to the continuing vitality of Section 5. Recent Court decisions have changed the standard for assessing the propriety of Congress's use of its enforcement power, resulting in a significant curtailing of Congressional authority.¹⁰⁵ Why this new limitation? On one level, it stems from the Court's unwillingness to allow Congress to use its enforcement power to legislate a complete shift in constitutional norms.¹⁰⁶ And the paradigm of such a complete shift would appear to occur when Congress substitutes a pure effects test for a constitutional purpose test.

A. *The Court's Upholdings of Section 5 as a Proper Exercise of
Congressional Enforcement Power*

The Court has twice undertaken an extensive consideration of whether Section 5 represents a valid exercise of Congress's enforcement power.¹⁰⁷ In

103. *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980) (plurality opinion).

104. See, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

105. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 947 (3d ed. 2000) (describing how the Court's recent decisions amount to a "significant and lasting cutback" of Congress's enforcement power); see also Kimberly E. Dean, Note, *In Light of the Evil Presented: What Kind of Prophylactic Antidiscrimination Legislation Can Congress Enact After Garrett*, 43 B.C. L. REV. 697, 725 (2002) (noting how the Court's recent decisions represent a "clear attempt to diminish Congress's [enforcement] power").

106. See *supra* note 10 and accompanying text.

107. The Court also addressed the constitutionality of Section 5 on two other occasions, but discussion of the issue in those cases was relatively concise. In *Georgia v. United States*, 411 U.S. 526 (1973), the Court used a single sentence to reaffirm Section 5's constitutionality. *Id.* at 535 ("And for the reasons stated at length in *South Carolina v. Katzenbach*, . . . we reaffirm that the Act is a permissible exercise of congressional power under [Section] 2 of the Fifteenth Amendment."). In *Lopez v. Monterey County*, 525 U.S. 266 (1999), the Court likewise made quick work in reaffirming the statute's constitutional validity, writing, "[i]n short, the Voting Rights Act, by its nature, intrudes on state sovereignty. The Fifteenth Amendment permits this intrusion, however, and our holding today adds nothing of constitutional moment to the burdens that the Act imposes." *Id.* at 284-85.

The decision in *Lopez* post-dates some of the Court's recent decisions that limit Congress's enforcement power. However, *Lopez* did not feature a head-on challenge to Section 5's constitutionality using these most recent precedents, as the State did not argue for application of those precedents in its brief. State Appellee's Brief on the Merits at 30-34, *Lopez*; see also John

*South Carolina v. Katzenbach*¹⁰⁸ and *City of Rome v. United States*,¹⁰⁹ the Court, with relatively little dissent,¹¹⁰ upheld Section 5.¹¹¹ In both these cases, the Court approved the statute by granting great deference toward Congress's use of its power.¹¹²

In *Katzenbach*, the State of South Carolina argued that Congress could only use its enforcement power to forbid actual constitutional violations.¹¹³ The Court, however, rejected the idea that Congress could be straight-jacketed to merely outlawing constitutional violations because the text and structure of the Fifteenth Amendment showed that Congress was "chiefly responsible for implementing the rights created" by that Amendment¹¹⁴ and that Congress had "full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting."¹¹⁵ For this reason, the Court applied the deferential rational basis test to Congress's exercise of its enforcement power.¹¹⁶ This meant that any "appropriate" legislation would be sustained,¹¹⁷ and the "inventive" Section 5 remedy was appropriate legislation because it represented a necessary response to "widespread and persistent discrimination in voting."¹¹⁸

More than a decade later, in *City of Rome*, the Court had to directly decide whether Congress could use its enforcement power to ban voting changes that had only a discriminatory effect.¹¹⁹ The City conceded that Congress had the power to enforce the constitutional prohibition against racial discrimination in voting, but contended that the constitutional right to

Matthew Guard, Comment, "Impotent Figureheads"? *State Sovereignty, Federalism, and the Constitutionality of Section 2 of the Voting Rights Act After Lopez v. Monterey County and City of Boerne v. Flores*, 74 TUL. L. REV. 329, 357 (1999) (describing how *Lopez* "does not thoroughly discuss the framework that exists after *Flores*").

108. 383 U.S. 301 (1966).

109. 446 U.S. 156 (1980).

110. In *South Carolina v. Katzenbach*, Justice Hugo Black was the lone dissenter. 383 U.S. at 355. In *City of Rome v. United States*, Justices Louis Powell, Potter Stewart, and William Rehnquist formed the Court's minority. 446 U.S. at 159.

111. See *supra* notes 108-09.

112. See *infra* notes 117, 126.

113. *Katzenbach*, 383 U.S. at 327 (describing "South Carolina's argument that Congress may appropriately do no more than to forbid violations of the Fifteenth Amendment in general terms—that the task of fashioning specific remedies or of applying them to particular localities must necessarily be left entirely to the courts").

114. *Id.* at 326.

115. *Id.*

116. *Id.* at 324 ("As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.").

117. *Id.* at 327. In reaching its holding, the Court invoked Chief Justice John Marshall's classic words: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id.* at 326 (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 421 (1819)).

118. *Katzenbach*, 383 U.S. at 327-28. The Court opened its opinion with an extended discussion of this Nation's lengthy history of blatant racial discrimination in voting. *Id.* at 308-15.

119. *City of Rome v. United States*, 446 U.S. 156, 173 (1980) (describing the City's argument that "[Section] 5, to the extent that it prohibits voting changes that have only a discriminatory effect, is unconstitutional").

be free of racial discrimination in voting only included a right to be free of purposeful discrimination.¹²⁰ Congress, on the other hand, had passed a law that protected minority voters from practices that merely had a discriminatory effect.¹²¹ This, according to the City, Congress did not have the power to do.¹²²

The Court rejected the City's contention,¹²³ holding that Congress could use its enforcement power to prohibit government action that would not violate the Constitution.¹²⁴ Once again the Court applied a rational basis test in its review of Section 5, allowing Congress to pass any "appropriate" statute attacking voting discrimination.¹²⁵ And Section 5's ban on voting changes with a racially discriminatory effect remained appropriate because it was rational for Congress to conclude that such changes created a risk of purposeful discrimination when those changes were made by state and local governments with a history of voting-related racial discrimination.¹²⁶

While a few dissents were penned in *City of Rome*,¹²⁷ Justice William Rehnquist's thoughts merit attention. In his view, changing from a purpose standard to an effect standard amounted to a Congressional shift of the substantive constitutional right.¹²⁸ He argued that such a shift violated separation of powers principles because it allowed Congress to define constitutional norms.¹²⁹ This view of the nature of Congress's enforcement

120. *Id.*

121. *Id.*

122. As the Court put it:

Congress passed the Act under the authority accorded it by the Fifteenth Amendment. The appellants contend that the Act is unconstitutional because it exceeds Congress'[s] power to enforce that Amendment. They claim that [Section] 1 of the Amendment prohibits only purposeful racial discrimination in voting, and that in enforcing that provision pursuant to [Section] 2, Congress may not prohibit voting practices lacking discriminatory intent even if they are discriminatory in effect.

Id.

123. *Id.* ("We hold that, even if [Section] 1 of the Amendment prohibits only purposeful discrimination, the prior decisions of this Court foreclose any argument that Congress may not, pursuant to [Section] 2, outlaw voting practices that are discriminatory in effect.").

124. *Id.* at 176.

125. *Id.* at 177 (holding that "[i]t is clear, then, that under [Section] 2 of the Fifteenth Amendment Congress may prohibit practices that in and of themselves do not violate [Section] 1 of the Amendment, so long as the prohibitions attacking racial discrimination in voting are appropriate") (internal quotations omitted).

126. *Id.* at 177 (holding that "Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact").

127. *Id.* at 193 (Powell, J., dissenting); *Id.* at 206 (Rehnquist, J., dissenting).

128. *Id.* at 211 (Rehnquist, J., dissenting) ("Thus, the result of the Court's holding is that Congress effectively has the power to determine for itself that this conduct violates the Constitution.").

129. *Id.* (Rehnquist, J., dissenting) (describing how the majority opinion calls into question "previously well-established distinctions between the Judicial Branch and the Legislative or Executive Branches of the Federal Government").

power did not prevail in *City of Rome*. However, after seventeen years and a title change, the general sentiments he outlined were adopted by a majority of his colleagues, albeit in a case that did not involve Section 5.

B. Section 5's Problem: The Court's Recent Decisions

So Section 5 would appear to be clearly constitutional under the Court's precedents. The problem is that those precedents, while not expressly overruled, seem to have considerably less value after the Court's more recent decisions.¹³⁰ In 1997, the Court handed down *City of Boerne v. Flores*.¹³¹ This case, and several subsequent decisions,¹³² place greater restrictions on Congress's exercise of its enforcement power.¹³³ No longer does the deferential rational basis standard apply.¹³⁴ Instead, the Court analyzes Congress's exercise of its enforcement power under the stricter congruence and proportionality standard,¹³⁵ a standard designed, in part, to prevent Congress from completely redefining the substance of constitutional rights.¹³⁶

Boerne involved the Court's consideration of the constitutionality of the Religious Freedom Restoration Act (RFRA).¹³⁷ That Act was passed in response to the Court's shift in its Free Exercise Clause doctrine. Basically, the Court moved to a doctrine that made it more difficult for religious individuals and groups to prove religious discrimination.¹³⁸ Dissatisfied with the Court's doctrinal shift, Congress passed RFRA in an effort to reinstate the old constitutional standard that was much more accommodating

130. As one commentator has noted: "[I]t is surely doubtful that the Court as presently constituted would have upheld the statute[] in . . . *City of Rome* One may wonder whether the Court is paying lip service to the earlier opinions while, as a practical matter, relegating them to the junk pile." Michael H. Gottesman, *Disability, Federalism, and a Court with an Eccentric Mission*, 62 OHIO ST. L.J. 31, 60 (2001).

131. 521 U.S. 507 (1997).

132. See *supra* note 9.

133. Jack M. Beermann, *The Unhappy History of Civil Rights Legislation, Fifty Years Later*, 34 CONN. L. REV. 981, 1030 (2002) (describing how the Court recently narrowed the scope of Congress's enforcement power); Day, *supra* note 9, at 366-67 (describing a "blitzkrieg of decisions by the Rehnquist Court interpreting and significantly narrowing the scope" of Congress's enforcement power).

134. Evan H. Caminker, "Appropriate" Means-Ends Constraints on Section 5 Powers, 53 STAN. L. REV. 1127, 1134-58 (describing how the Court's recent decisions shifted the standard of review of legislation passed under the enforcement power from rational basis scrutiny to rigorous scrutiny); Dean, *supra* note 105, at 728 (describing how *Boerne* moved the Court's review of legislation passed under the enforcement power from "the traditional rational relationship test . . . to a stricter congruence and proportionality test.").

135. Dean, *supra* note 105, at 728.

136. Cole, *supra* note 10, at 57 (noting that under the *Boerne* standard "Congress is not free to take actions that impose requirements beyond the substantive constitutional standard as the Supreme Court has enforced it itself.").

137. *City of Boerne v. Flores*, 521 U.S. 507, 512 (1997).

138. The Court went from a doctrinal test that asked whether a law "substantially burdened a religious practice and, if it did, whether the burden was justified by a compelling government interest" to a test that allowed "neutral, generally applicable laws [to] . . . be applied to religious practices even when not supported by a compelling government interest." *Id.* at 513-14 (citing *Employment Div. Dept. of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990)).

of religion—¹³⁹ in essence to replace an intent test with an effects test.¹⁴⁰ According to Congress, the ability to pass RFRA emanated from its enforcement power.¹⁴¹

In deciding whether RFRA was a proper enactment under the enforcement clause, the Court acknowledged that Congress could ban some governmental conduct that was not itself unconstitutional.¹⁴² As the Court observed: “Legislation which deters or remedies constitutional violations can fall within the sweep of Congress’[s] enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into ‘legislative spheres of autonomy previously reserved to the States.’”¹⁴³ The Court found support for this proposition by harkening back to its decisions that endorsed voting rights remedies of similar ilk.¹⁴⁴ But then the Court shifted gears, explaining that there are limits to Congress’s power to ban constitutional government action,¹⁴⁵ and that the limits prevent Congress from changing the nature of a constitutional right. “Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power ‘to enforce,’ not the power to determine what constitutes a constitutional violation.”¹⁴⁶ Thus, Congress may only pass laws that are congruent and proportional to

139. *Boerne*, 521 U.S. at 515-16.

140. *Cole*, *supra* note 10, at 46 (“RFRA . . . prohibited state action that had a burdensome effect on religious exercise where the Court had interpreted the Free Exercise Clause to require a showing of intentional discrimination.”).

141. *Boerne*, 521 U.S. at 516. As the Court wrote, “It is said the congressional decision to dispense with proof of deliberate or overt discrimination and instead concentrate on a law’s effects accords with the settled understanding that [Section] 5 [of the Fourteenth Amendment] includes the power to enact legislation designed to prevent, as well as remedy, constitutional violations.” *Id.* at 517. At the outset of the opinion, the Court viewed RFRA as shifting the standard for proving religious discrimination from a purpose standard to an effects standard. However, toward the end of the opinion, the Court characterized RFRA as being something less than an effects standard. *Id.* at 535 (describing RFRA’s substantial basis test as “not even a discriminatory-effects or disparate-impact test”). This is somewhat puzzling because not only is it internally inconsistent, but it seems likely that any law that has a substantial burden on a religious practice would seemingly have a disparate impact against a particular religion.

142. *Id.* at 518.

143. *Id.* (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)).

144. The Court wrote:

For example, the Court upheld a suspension of literacy tests and similar voting requirements . . . despite the facial constitutionality of the tests We have also concluded that other measures protecting voting rights are within Congress’[s] power to enforce the Fourteenth and Fifteenth Amendments, despite the burdens these measures placed on the States.

Boerne, 521 U.S. at 518.

145. *Id.* (“It is also true, however, that ‘[a]s broad as the congressional enforcement power is, it is not unlimited.’”) (quoting *Oregon v. Mitchell*, 400 U.S. 112, 128 (1970)).

146. *Boerne*, 521 U.S. at 519; *see also id.* at 545 (O’Connor, J., dissenting) (agreeing that “Congress lacks the ability independently to define or expand the scope of constitutional rights by statute.”).

the problem of unconstitutional discrimination.¹⁴⁷ This is because, under the Constitution, the Judicial Branch has the “duty to say what the law is,”¹⁴⁸ and such authority is needed to “maintain separation of powers and the federal balance.”¹⁴⁹ RFRA, however, changed the constitutional standard; thus it represented an unconstitutional exercise of the enforcement power.

So under this new doctrine, Congress lacks the power to completely redefine the standard for finding a violation of a constitutional right.¹⁵⁰ Yet, after the Court’s decisions in the *Bossier* cases, Section 5’s primary function, the retrogression test, did just that.¹⁵¹ The Court has defined the constitutional right to vote as one that prevents purposeful discrimination in voting, with the Fifteenth Amendment prohibiting “purposefully

147. *Id.* at 520 (“There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”).

148. *Id.* at 536 (citing *Marbury v. Madison*, 1 Cranch 137, 177 (1803)).

149. *Boerne*, 521 U.S. at 536.

150. The rule that separation of powers does not allow Congress to completely redefine the standard for finding a constitutional violation remains unchanged by the Court’s recent decisions upholding two remedies as proper exercises of Congress’s enforcement power—the Family and Medical Leave Act (FMLA) and Title II of the Americans With Disabilities Act (ADA) as applied to access to the courts. *Tennessee v. Lane*, 124 S. Ct. 1978 (2004) (upholding Title II of the ADA as applied to access to the courts); *Nevada Dep’t of Human Res. v. Hibbs*, 123 S. Ct. 1972, 1976 (2003) (upholding the FMLA). Neither the FMLA nor Title II amounts to a violation of separation of powers by making a wholesale change in a constitutional standard.

The FMLA does not violate separation of powers because it does not facially contravene the Court’s idea of what equal protection means in the context of gender discrimination. To the Court, protection from gender discrimination means nondiscrimination absent an “important governmental objective[]” that “[must] ‘not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.’” *Hibbs*, 123 S. Ct. at 1978 (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)). The FMLA facially adheres to this notion of nondiscrimination by providing a remedy to all employees regardless of gender. *Id.* at 1982-83 (describing the FMLA as setting “a minimum standard of family leave for *all* eligible employees, irrespective of gender”) (emphasis in original). In other words, the FMLA might have implicated separation of powers concerns if it had only provided a remedy for one particular gender, but because the FMLA treated both genders equally, it conformed to the Court’s idea of equal protection. In contrast, Section 5 appears to facially contravene the Court’s idea of nondiscrimination (absent a “compelling interest” and “narrow tailoring”) in the context of racial discrimination by providing a remedy only to a particular class of persons (i.e., certain racial and language minorities). See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 221 (1995) (describing the standard for the Court’s review of government action that is facially race-based).

Title II did raise some separation of powers concerns because it provides a special remedy to a particular class of persons—the disabled—without a showing of discriminatory purpose. *Lane*, 124 S. Ct. at 2006 (describing the ADA as requiring “special” accommodations) (Rehnquist, C.J., dissenting). However, the underlying standard of Title II, as interpreted by the Court, does not simply outlaw each and every practice that has a discriminatory effect on persons with disabilities. *Lane*, 124 S. Ct. at 1993 (noting that “Title II does not require States to employ *any and all means* to make judicial services accessible to persons with disabilities”) (emphasis added). Rather, Title II sets up a system where liability is not triggered by a mere discriminatory effect, but is triggered by a failure to make “reasonable modifications” to provide access to the courts. *Id.* Indeed, the Court itself read Title II to be relatively consistent with its own doctrine. *Id.* at 1994 (“This duty to accommodate is perfectly consistent with the well-established due process principle that, ‘within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard’ in its courts.”) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)). In contrast, the pre-*Georgia* Section 5 retrogression test required any and all reductions in minority voting strength to be remedied. See *supra* notes 52-66 and accompanying text (describing Attorney General’s application of the retrogression test).

151. See *supra* Part I.A.

discriminatory denial or abridgment by government of the freedom to vote”¹⁵² and the Fourteenth Amendment prohibiting voting systems that are “conceived or operated as [a] purposeful devic[e] to further racial . . . discrimination.”¹⁵³ In contrast, the retrogression test reached voting changes that purely had a discriminatory effect.¹⁵⁴

There may, however, be some reason to think that the Court’s recent precedent presented no problem for the Section 5 retrogression test. This is because almost all of the cases decided using the Court’s congruence and proportionality doctrine have spoken glowingly of the remedies Congress passed under the Voting Rights Act,¹⁵⁵ so maybe voting rights remedies are grandfathered in under the pre-congruence and proportionality standard.¹⁵⁶

152. *City of Mobile v. Bolden*, 446 U.S. 55, 65 (1980) (plurality opinion); *see also* *Myers v. Anderson*, 238 U.S. 368, 379 (1915) (requiring invidious motivation for Fifteenth Amendment claim); *Guinn v. United States*, 238 U.S. 347, 363-65 (1915) (requiring invidious motivation for Fifteenth Amendment claim).

153. *Bolden*, 446 U.S. at 66 (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 149-50 (1971) (alteration in original)). The Court has recognized claims of vote dilution under the Fourteenth Amendment, but the Court has yet to decide whether a vote dilution claim may be pursued under the Fifteenth Amendment. *Voinovich v. Quilter*, 507 U.S. 146, 159 (1993); *but cf. Bolden*, 446 U.S. at 66 (implying vote dilution claim is not sustainable under Fifteenth Amendment) *with* *Gomillion v. Lightfoot*, 364 U.S. 339, 345 (1960) (implying vote dilution claim is sustainable under Fifteenth Amendment).

154. Under the Court’s Equal Protection doctrine the government can now implement a facially race-based remedy in certain contexts without a showing of purposeful discrimination. *See Grutter v. Bollinger*, 539 U.S. 306, 326-31 (2003) (upholding an affirmative action program without showing a history of purposeful discrimination). Moreover, the Court appears willing to allow a greater use of race by government actors in the redistricting process—again without any showing of discriminatory purpose. *See Easley v. Cromartie*, 532 U.S. 234, 241 (2001) (disallowing the use of race only when it predominates in the redistricting process). Thus, it could be argued that Section 5 conforms with the Court’s Equal Protection doctrine because race was used in a context where the Court would allow the use of race absent a showing of purposeful discrimination. *See id.*

However, even in the contexts where government seems to have more leeway to engage in race-based activity without a showing of purposeful discrimination, the use of race must be narrowly tailored. *See Grutter*, 539 U.S. at 339 (describing the need for narrow tailoring when a government engages in race-based action). It is likely the Section 5 retrogression test violated the Court’s idea of narrow tailoring because simply counting up the number of districts where minority voters could elect a candidate of choice and requiring the automatic retention of all such districts could be viewed as a reflexive use of race akin to a quota system. *See, e.g., Gratz v. Bollinger*, 539 U.S. 244, 269-76 (2003) (finding an automatic numerical enhancement for minority college applicants to lack the narrow tailoring required by strict scrutiny); *see also* *Katz*, *supra* note 16, at 2376 n.203 (describing how *Georgia* reflects the Court’s desire to restrict the mechanical use of race in government decision-making).

155. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 647 (1999) (describing how “*City of Boerne* discussed with approval the various limits that Congress imposed in its voting rights measures”); *City of Boerne v. Flores*, 521 U.S. 507, 526-27 (1997) (describing the Court’s approval of “new, unprecedented remedies” to attack voting discrimination); *see also Hibbs*, 538 U.S. at 735-39 (looking favorably upon voting rights remedies); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. at 373-74 (looking favorably upon voting rights remedies); *United States v. Morrison*, 529 U.S. 598, 625-27 (2000) (distinguishing voting rights remedies in a positive light).

156. *See* Douglas Laycock, *Conceptual Gulfs in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 743, 749 (1998) (suggesting that the Court may be reaffirming previous voting rights remedies “under an implicit grandfather clause”).

Maybe, too, the Court's doctrine only applies to legislation passed under the Fourteenth Amendment and not to voting rights legislation passed under the Fifteenth Amendment,¹⁵⁷ or perhaps the Court will only apply an extremely soft version of congruence and proportionality to voting rights remedies because voting is a "fundamental matter in a free and democratic society."¹⁵⁸

Better yet, even assuming the Court's doctrine applies to voting rights remedies, maybe the pre-*Georgia* retrogression test already served as an adequate proxy for a finding of purposeful discrimination.¹⁵⁹ This could be because the jurisdictions covered by Section 5 have an actual history of purposeful voting-related discrimination,¹⁶⁰ and it is eminently logical to presume discriminatory purpose exists when a jurisdiction with a history of purposeful voting discrimination adopts a voting change that results in a discriminatory impact.¹⁶¹ In a nutshell, this is the Court's rationale from *City of Rome*.¹⁶²

157. This is because all the cases in which the Court has used its new Enforcement Power doctrine have involved Congressional remedies passed pursuant to the Fourteenth Amendment power and Section 5 has been previously upheld as a remedy properly passed pursuant to the Fifteenth Amendment power. Compare *supra* note 9 (listing cases decided under the Fourteenth Amendment) with *supra* note 6 (listing cases upholding Section 5 as a proper remedy under the Fifteenth Amendment). The Court, however, has often equated Congress's enforcement power under the two amendments. *Garrett*, 531 U.S. at 373 n.8 (describing Congress's power under the Fourteenth Amendment as "virtually identical" to that of the Fifteenth Amendment); *Boerne*, 521 U.S. at 517-18 (describing Congress's power under the Fourteenth Amendment as "parallel" to that under the Fifteenth Amendment); *Katzenbach v. Morgan*, 384 U.S. 641, 650-51 (1966) (describing Congress's power under the Fourteenth Amendment as "similar" to that under the Fifteenth Amendment). Moreover, the Court has never held that the Fifteenth Amendment protects against vote dilution. See *supra* note 153.

158. *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964); see also *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) ("[T]he political franchise of voting is . . . a fundamental political right, because [it is] preservative of all rights."). For a lengthier discussion of the idea that voting rights remedies may get different treatment under congruence and proportionality, see *Pitts*, *supra* note 20, at 268-77.

159. *Ellen D. Katz, Federalism, Preclearance, and the Rehnquist Court*, 46 VILL. L. REV. 1179, 1196-97 (2001) ("Limiting Section 5's effect prong to retrogressive effect arguably restricts its reach to conduct for which invidious intent is the likely explanation.").

160. *City of Rome v. United States*, 446 U.S. 156, 177 (1980) (describing how Section 5 covers jurisdictions with a "demonstrable history of intentional racial discrimination in voting"); *United Jewish Orgs. of Williamsburg v. Carey*, 430 U.S. 144, 156-57 (1977) (plurality opinion) (describing how jurisdictions became covered by Section 5 "whenever it was administratively determined that certain conditions which experience had proved were indicative of racial discrimination in voting had existed in the area"); see also *Timothy G. O'Rourke, Voting Rights Act Amendments of 1982: The New Bailout Provision and Virginia*, 69 VA. L. REV. 765, 772-73 (1983) (describing the coverage formula as "rest[ing] on the rationale that the conjunction of low voter registration or turnout and the use of a literacy test . . . establishes a presumption that discrimination exists in the voting processes.").

161. See *City of Rome*, 446 U.S. at 177.

162. Maybe, too, the Section 5 effects test takes aim at actual purposeful discrimination because, at least in the vote dilution context, retrogression cannot occur without the existence of racially polarized voting. See *Thornburg v. Gingles*, 478 U.S. 30, 62 (1986) (plurality opinion). However, this theory is subject to criticism on an evidentiary, doctrinal, and practical level. The evidentiary criticism would be that the traditional statistical analysis used to prove racially polarized voting does not account for the multiplicity of reasons why voters cast their ballots (i.e., voters might be casting their ballots for reasons unrelated to racial discrimination). *Id.* at 63 (noting that "the reasons black and white voters vote differently have no relevance to the central inquiry of [Section] 2 [of the Voting Rights Act]"); see also *Richard H. Pildes, Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505, 2512 n.23 (1997). The doctrinal criticism would be that a private

However, a major problem with this line of reasoning is that every year we get further and further from much of the actual, blatantly purposeful discrimination that serves as the predicate for covering a jurisdiction under Section 5. These jurisdictions were deemed to be places where purposeful discrimination occurred because, during the 1960s and 1970s, a literacy test or other discriminatory device was used and there was statistical evidence of depressed voter participation.¹⁶³ True, almost a century of blatant discrimination occurred between the conclusion of the Civil War and the passage of the Voting Rights Act,¹⁶⁴ but a generation has passed since much of the most obvious and egregious discrimination occurred.

Another more practical problem emanates from the Court's disinclination to embrace a generalized history of discrimination as a proxy for the implementation of race-based remedies.¹⁶⁵ The Court does not look favorably upon the use of race-based remedies to counteract "societal" discrimination;¹⁶⁶ instead, the Court requires a compelling showing of a history of discrimination and a very tight nexus between that history and the race-based remedy being used.¹⁶⁷ Section 5 would seem to contravene this

individual's decision to cast a vote for racially discriminatory reasons is not "state action" attributable to the government for the purposes of enforcing the Fourteenth and Fifteenth Amendments. See *Rogers v. Lodge*, 458 U.S. 613, 647 n.30 (Stevens, J., dissenting) (asserting that an individual's act of voting does not qualify as governmental action). The practical argument would be that *Georgia* itself seems to de-emphasize the prominence of racially polarized voting to the Section 5 retrogression standard. Compare *infra* notes 188-89 and accompanying text (describing the importance of the levels of racially polarized voting to the district court's decision) with *infra* note 190 (describing the unimportance of racially polarized voting to the Supreme Court's decision).

163. 42 U.S.C. § 1973b(b). The coverage formula applies Section 5 to places where (1) the Attorney General determined a test or device was used as of a certain date (November of 1964, 1968, or 1972) and (2) the Director of the Census determined that, as of a certain date (November of 1964, 1968, or 1972), less than 50% of the voting age population was registered or less than 50% of the registered voters cast ballots in the November (of 1964, 1968, or 1972) presidential election. *Id.*

164. See *City of Rome*, 446 U.S. at 181-82; see also *South Carolina v. Katzenbach*, 383 U.S. 301, 337 (1966) (describing how there was "nearly a century of widespread resistance to the Fifteenth Amendment").

165. See, e.g., *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 498 (1989) (recognizing, in the context of a minority contracting program, that "a generalized assertion that there has been past discrimination . . . provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy"); see also Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 498 (2003) (describing how the Rehnquist Court's equal protection doctrine seems "less concerned with history and social structure"); J. Morgan Kousser, *Voting Rights Struggles in Georgia*, 3 ELECTION L.J. 53, 60 (2003) (criticizing the Court's failure to acknowledge Georgia's history of voting-related racial discrimination in finding the State's post-1990 Congressional redistricting plan to be an unconstitutional racial gerrymander).

166. See Kenneth L. Karst, *The Revival of Forward-Looking Affirmative Action*, 104 COLUM. L. REV. 60, 69 (2004) (describing how the Court does not think race-based remedies "can be justified as compensation for past societal discrimination").

167. *Shaw v. Reno*, 509 U.S. 630, 656 (1993) (noting that a state must have a "strong basis in evidence" in order to justify the use of a race-based remedy to "eradicat[e] the effects of past racial discrimination"); see also *Bush v. Vera*, 517 U.S. 952, 982 (1996) (plurality opinion) (finding that a state may only remedy discrimination when it can show "specific, 'identified discrimination'" and a

principle by using a coverage formula that represents only a very generalized finding of purposeful discrimination. For example, while the coverage formula mostly ensnares places like Alabama and Mississippi where purposeful racial discrimination most definitely occurred, it also covers places like New Hampshire where it seems utterly impossible to make a case that discrimination in voting was prevalent enough to require the stringent Section 5 remedy.¹⁶⁸ Moreover, the coverage formula is not jurisdiction specific—for instance, cities and school districts can get swept up because the county they lie within is covered; and, to engage in a race-based remedy, the Court seems to strongly prefer evidence specific to each jurisdiction.¹⁶⁹

Section 5, however, does have an escape hatch for jurisdictions that were wrongfully covered or where discrimination no longer exists.¹⁷⁰ This escape mechanism is known as a “bailout,” and it can be obtained by securing a declaratory judgment from the United States District Court for the District of Columbia.¹⁷¹ Yet, bailout has been tough to achieve, as only a handful of jurisdictions have successfully obtained a declaratory judgment under the existing bailout standard.¹⁷² In addition, not all jurisdictions can bail out; generally, cities and school districts are ineligible unless the county in which they are located institutes a successful bailout action;¹⁷³ and a county may not bailout unless all its subjurisdictions would also meet the bailout standard.¹⁷⁴ For these reasons, the Court might view Section 5 as overbroad in its coverage of places without an actual or recent history of voting-related discrimination.

The bottom line is that the Court has shifted its enforcement power doctrine away from the rationale explicated by the majority in *City of Rome* and has more or less adopted Justice Rehnquist’s dissent in that case. For this reason, the Court’s congruence and proportionality doctrine presented a genuine problem for the Section 5 effects test. *Georgia*, however, resolved that problem.

III. GEORGIA AND THE NEW STANDARD FOR RETROGRESSION

Prior to *Georgia*, Section 5 primarily involved a review of whether a voting change left minority voters in a worse position than prior to adoption

“‘strong basis in evidence’” to conclude that race-based action is necessary) (quoting *Shaw v. Hunt*, 517 U.S. 899, 910 (1996)).

168. See *supra* note 26 (listing covered jurisdictions).

169. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 222 (1995) (noting that “a state or local subdivision . . . has the authority to eradicate the effects of private discrimination *within its own legislative jurisdiction*”) (quoting *J.A. Croson Co.*, 488 U.S. at 491-92) (emphasis added).

170. See 42 U.S.C. § 1973b(a).

171. *Id.*

172. See U.S. Department of Justice, Civil Rights Division, Voting Section, *About Section 5 of the Voting Rights Act*, at http://www.usdoj.gov/crt/voting/sec_5/types.htm (last visited Sept. 9, 2004), (listing jurisdictions that have bailed out under the standard adopted by Congress in 1982).

173. *City of Rome v. United States*, 446 U.S. 156, 169 (1980).

174. 42 U.S.C. § 1973b(a)(1)(A)-(F) (requiring jurisdictions seeking bailout to prove that certain voting rights violations have not occurred “within its territory”).

of the change.¹⁷⁵ This was a pure effects test. But *Georgia* changed all that. While nominally the “retrogression” test has been retained, its substance involves an entirely new standard. For the first time, the Section 5 effects prong involves more than just a review of whether a voting change has a negative impact on minority voters; it involves a number of additional evidentiary factors, resulting in an inquiry into the “totality of the circumstances.”¹⁷⁶

A. Georgia at the District Court

In *Georgia*, the State sued for preclearance of its post-2000 census redistricting plan for the Senate, a governing body that elects fifty-six members from single-member districts.¹⁷⁷ Using 2000 census data, the existing districting plan had thirteen districts with a total African-American population majority, twelve of which had an African-American voting age population majority.¹⁷⁸ The proposed plan also contained thirteen districts with a total African-American population majority, all thirteen of which had an African-American voting age population majority.¹⁷⁹

After reviewing the statewide impact of the proposed plan, the Attorney General mounted a narrow challenge to changes in Senate Districts 2, 12, and 26, alleging that African-American population reductions in those districts resulted in an impermissible retrogressive effect.¹⁸⁰ District 2 had an African-American voting age population of almost 60% in the existing plan and an African-American voting age population of just over 50% in the proposed plan;¹⁸¹ District 12 had an African-American voting age population of just over 55% in the existing plan and an African-American voting age population of just over 50% in the proposed plan;¹⁸² and District 26 had an African-American voting age population of about 62% in the existing plan and an African-American voting age population of about 51% in the proposed plan.¹⁸³

175. See *supra* note 45 and accompanying text.

176. See *Georgia v. Ashcroft*, 539 U.S. 461, 480 (2003).

177. 195 F. Supp. 2d 25, 55 (D.D.C. 2002). The State also sought preclearance of its Congressional and State House redistricting plans. *Id.* at 29. The Attorney General did not oppose implementation of these plans and, after making its own independent review, the district court agreed. *Id.* at 97.

178. *Id.* at 55.

179. *Id.* at 56.

180. *Id.* at 72 (“The Attorney General eventually identified only the Senate redistricting plan as objectionable, and, in particular, proposed Senate Districts 2, 12 and 26.”).

181. *Id.* at 56-57. Georgia asserted that the African-American voting age population was 50.31%; the United States contended that it was just under 50% at 49.81%. *Id.* at 57.

182. *Id.* at 59.

183. *Id.* at 61.

The district court began its analysis of whether or not the proposed plan violated the Section 5 effects prong by attempting to delineate the legal standard for judging retrogression.¹⁸⁴ The court struggled to enunciate a standard because, despite years of implementation of Section 5, the Supreme Court had never defined retrogression nor “engaged in any detailed discussion of what constitutes an ‘effective exercise of the electoral franchise’ by minority voters.”¹⁸⁵ After acknowledging the lack of clear guidance, the district court concluded that the only means to assess retrogression was to determine “whether a proposed change would leave minority voters in a ‘worse’ position than under the existing plan.”¹⁸⁶ But such a standard merely restated the definition of the word retrogression and gave little insight into how to assess whether a new plan was, in fact, worse.

Ultimately, the district court concluded that the proper way to assess retrogression was to use the same standard that had been implemented for many years by the Attorney General.¹⁸⁷ The district court essentially looked solely at whether districts that provided minority voters with a chance to elect candidates of choice had undergone a reduction in the percentage of minority population.¹⁸⁸ Then, the district court assessed the level of racially polarized voting to determine whether any of those reductions were likely to result in the elimination or diminishment of minority voters’ ability to elect a candidate of choice.¹⁸⁹ The district court summarized its analysis and subsequent holding as follows:

[T]he more we find evidence of racial polarization in the disputed Senate districts, the more we are persuaded that Georgia has failed to meet its burden of proving that the reductions in African American populations in those districts and in other majority-minority districts has not lessened the ability of its African American voters to effectively exercise their collective right to vote.¹⁹⁰

184. *Id.* at 73-78.

185. *Id.* at 74; *see also supra* note 51 and accompanying text.

186. *Georgia*, 195 F. Supp. 2d at 74.

187. *See supra* notes 52-66 and accompanying text (discussing how the Attorney General implemented the retrogression test).

188. *Georgia*, 195 F. Supp. 2d at 75 (describing the analysis as “asking whether the elimination of a majority-minority district—or the reduction of African American population in such a district—is actually retrogressive”).

189. *Id.* at 76. The Court wrote:

In a Section 5 case, this court’s analysis—while limited to the question of retrogression—is fact-intensive and must carefully scrutinize the context in which the proposed voting changes will occur. In particular, the level of racially polarized voting, or the degree to which there is a correlation between the race of a voter and the way in which the voter votes, sheds light on whether a decrease in districts’ minority populations will produce an impermissibly retrogressive effect.

Id. (internal quotations and citations omitted).

190. *Id.* at 78; *see also id.* at 31 (“Where there is evidence of racially polarized voting, a redistricting plan that reduces African American votes in a district with no offsetting gains elsewhere raises the specter of impermissible retrogression.”); *id.* at 76 (“In particular, the level of racially

In its particularized assessments of the reductions of minority population in Districts 2, 12, and 26, the district court found “credible [statistical] evidence that suggests the existence of highly racially polarized voting in the proposed districts.”¹⁹¹ This fact “compelled” the district court “to conclude that the evidence of racial polarization suggests the likelihood of retrogression.”¹⁹² In addition, the district court found lay witness testimony regarding racial politics and polarization in the proposed districts served to

polarized voting, or the degree to which there is a correlation between the race of a voter and the way in which the voter votes, sheds light on whether a decrease in districts’ minority populations will produce an impermissibly retrogressive effect.”) (internal quotations and citations omitted); *id.* (“However, if racially polarized voting persists in an area and its electoral history demonstrates that minority voters’ preferences diverge greatly from those of non-minority voters, a decrease in [black voting age population] may translate into a lessening of minority voting strength.”).

In scrutinizing the plans presented for preclearance, we must therefore consider whether the State has met its burden of demonstrating that the dispersion of African American voting age population throughout the districts is not so affected by racial bloc voting that it will have a negative impact on the opportunities available to Georgia’s African American voters to make their collective voices heard.

Id.; *id.* at 77-78 (“In particular, if voting patterns are not marked by racially polarized voting or other barriers to the effective exercise of minority voters’ franchise, dilution may have little or no effect on the ability of those voters to elect preferred candidates.”).

As explained above, in the present case, racial polarization is critically important because its presence or absence in the Senate districts challenged by the United States goes a long way to determining whether or not the decreases in [black voting age population] and African American voter registration in those districts are likely to produce retrogressive effects.

Id. at 84.

191. *Id.* at 88; *see also id.* at 70-71 (describing the statistical evidence of racially polarized voting in Senate Districts 2, 12, and 26). At the district court, the State and the Attorney General disputed the type of statistical evidence relevant to determining whether retrogression occurred. *Id.* at 64-71 (discussing statistical evidence proffered by the State and the Attorney General). The State offered probit analysis aimed at showing what percentage of African-American voting age population in a district produces a 50% chance that African-American voters’ candidate of choice will win—the so-called “point of equal opportunity.” *Id.* at 64-68. The Attorney General offered a regression analysis, a more traditional statistical analysis used in voting rights cases, that used aggregate data in an attempt to infer the severity of racial bloc voting. *Compare id.* at 69 (describing Supreme Court’s past reliance on regression analysis) *with id.* at 65 (describing how no court had ever relied on probit analysis in reviewing a redistricting plan).

In the end, the district court relied heavily on traditional regression analysis and more or less rejected probit analysis. *Id.* at 80 (“The court rejects the notion that the ‘point of equal opportunity’ is in any way dispositive of the Section 5 inquiry.”); *id.* at 88 (describing how the regression analysis “suggests that Senate races in the proposed districts will be marked by racially polarized voting”). While this battle of statistics played a prominent role in the district court’s opinion, it did not play a major role in the outcome at the Supreme Court, as the Court barely mentioned the parties’ statistical evidence. *See Georgia v. Ashcroft*, 539 U.S. 461, 486 (2003). *Georgia* noted that:

Georgia introduced evidence showing that approximately one-third of white voters would support a black candidate . . . and that the United States’ own expert admitted that results of the statewide elections in Georgia show that there would be a very good chance that . . . African American candidates would win election in the reconstituted districts.

Id. (internal quotations omitted). The Court, however, appeared to reject the basic premise of probit analysis by holding that Section 5, unlike Section 2 of the Voting Rights Act, was not a test of “equal opportunity.” *Id.* at 477-80; *see also id.* at 475.

192. *Georgia*, 195 F. Supp. 2d at 88.

buttress the statistical analysis that proved these districts violated the Section 5 effects standard.¹⁹³

While finding that retrogression resulted from the reductions of minority population in these districts, the district court rejected as irrelevant some of the State's proffered evidence.¹⁹⁴ The State contended that the near unanimity of African-American legislators' support for the plan demonstrated that no retrogression was present.¹⁹⁵ But the district court found that "the legislators' support is, in the end, far more probative of a lack of retrogressive *purpose* than of an absence of retrogressive *effect*."¹⁹⁶ The State also contended that the plan was not retrogressive because it was designed to elect members of the Democratic Party,¹⁹⁷ and most African-American voters¹⁹⁸ and all African-American legislators were Democrats.¹⁹⁹ This, argued the State, showed non-retrogression because minority voters and minority legislators would have their legislative influence preserved.²⁰⁰ But the district court rejected these contentions as without precedent, asserting there was "no authority that supports the proposition that a political party's overall success, and accompanying positions of power for minority legislators, should be considered in assessing minority voters' effective exercise of their electoral franchise."²⁰¹

So the district court engaged in a standard *Beer* retrogression analysis, treading on familiar ground.²⁰² The Supreme Court, however, soon would move the retrogression test in a new direction.

193. *Id.*; see also *id.* at 58-59 (describing lay witness testimony about racially polarized voting in Senate District 2); *id.* at 60-61 (describing lay witness testimony about racial politics in Senate District 12); *id.* at 61-62 (describing lay witness testimony of racially polarized voting in Senate District 26); *id.* at 89-91 (describing lay witness testimony as to whether the changes in Senate Districts 2, 12, and 26 were retrogressive).

194. See *id.* at 89.

195. *Id.* at 88-89. The proposed plan was adopted with the support of every African-American state legislator, save two. *Id.* at 55.

196. *Id.* at 89.

197. *Id.* at 41 (describing testimony from a State official that the goal of the redistricting was to "maintain the number of minority districts that we presently had, but at the same time maintain and increase the number of Democratic seats").

198. *Id.* at 92 (describing testimony that the "great majority of the African American voters in the State of Georgia, 90 percent or more tend to vote the Democratic way").

199. *Id.* at 41 ("All of the African American legislators in the Georgia General Assembly are Democrats.").

200. *Id.* at 91 ("Georgia asks the court to equate African American voters' electoral strength with the success of the Democratic Party at the polls."); *id.* at 92 (describing Georgia's argument that "legislative influence" in terms of chairpersonships of committees and subcommittees should be a factor in the retrogression test); *id.* (describing testimony that "were Republicans to be the majority in the Senate, Democratic African Americans would lose several positions as committee chairs").

The Senate's majority leader and rules committee chair were African-American. *Id.* at 42. In addition, seven or eight other African-American Senators were eligible to chair committees. *Id.*

201. *Id.* at 92; see also *id.* at 93 ("The court emphatically rejects the notion that a plan that protects Democratic incumbents and a Democratic majority is necessarily a plan that does not retrogress with respect to African American voting strength.").

202. District Judge Louis F. Oberdorfer dissented in part. *Id.* at 102. He expressed doubt that a plan that reduced the "probability" of electing minority voters' candidate of choice in three out of fifty-six districts could be considered retrogression for that "reason alone." *Id.* at 102-03 (Oberdorfer, J., dissenting). In his view, the legal test for retrogression was whether the proposed

B. The Supreme Court's Creation of a New Test for Retrogression

The Supreme Court vacated.²⁰³ In its opinion, the Court nominally retained the retrogression test, reasserting its view that federal approval should be denied to any voting change that would “lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.”²⁰⁴ However, for the first time ever, the Court defined the meaning of the phrase “effective exercise of the electoral franchise.”²⁰⁵

The Court provided this definition by creating a “totality of the circumstances” test,²⁰⁶ asserting that an assessment of whether a change retrogresses a minority group’s effective exercise of the electoral franchise depended on “an examination of all the relevant circumstances, such as the ability of minority voters to elect their candidate of choice, [and] the extent of the minority group’s opportunity to participate in the political process.”²⁰⁷ Retrogression, thus, is not solely about “the comparative ability of a minority group to elect a candidate of its choice.”²⁰⁸ Instead, retrogression involves an assessment of the totality surrounding the ability of a minority group to elect candidates of choice in “safe” and “coalition” districts,²⁰⁹ and the ability of a minority group to participate in the political process by assessing gains and losses in the number of “influence” districts, the support or opposition of minority incumbent legislators, and the increases or decreases in relative positions of power of those legislators.²¹⁰

A comparison of the number of “safe” and “coalition” districts in the benchmark and proposed plans represents the first part of the analysis.

plan preserved a “fair,” “equal,” or “reasonable” opportunity to elect candidates of choice. *Id.* at 116-17 (Oberdorfer, J., dissenting); *see also id.* at 126-27 (Oberdorfer, J., dissenting) (“It is my view that [Section] 5 does not prevent a state from adopting a redistricting plan, with the blessing of African-American legislators, that reduces ‘packed’ concentrations of black voters so long as it preserves equal or fair opportunities for minorities to elect candidates of choice.”). And looking at the statistical evidence and the lay testimony from three prominent African-American elected officials, Judge Oberdorfer saw no reason to believe the proposed plan did not preserve an equal opportunity for minority voters to elect candidates of choice. *Id.* at 103-04 (Oberdorfer, J., dissenting).

Circuit Judge Harry T. Edwards wrote a concurring opinion that harshly criticized Judge Oberdorfer’s dissent. *Id.* at 97-102.

203. *Georgia v. Ashcroft*, 539 U.S. 461, 490 (2003).

204. *Id.* at 479 (citing *Beer v. United States*, 425 U.S. 141 (1976)).

205. *Georgia*, 539 U.S. at 479 (allowing that the Court had “never determined the meaning of ‘effective exercise of the electoral franchise’”).

206. *Id.* at 480 (describing how a court should “assess[] the totality of the circumstances”); *id.* at 484 (asserting that “a court or the Department of Justice should assess the totality of circumstances in determining retrogression under [Section] 5”).

207. *Id.* at 479. The Court also recognized that any assessment of retrogression involved examining the “feasibility of creating a non retrogressive plan.” *Id.* This Article will leave this aspect of the totality test alone because *Georgia* provides no meaningful discussion of this factor.

208. *Id.* at 480.

209. *Id.* at 480-86.

210. *Id.* at 482-85.

These districts would likely provide different types of success rates for minority candidates of choice and different types of representation for minority voters. The safe districts “virtually guarantee” a minority group’s preferred candidate of choice.²¹¹ With such districts being very likely to result in more “descriptive” representation because the winning candidate will probably be a member of the same minority group as the district’s voters.²¹² In contrast, coalition districts provide the “opportunity” to elect a minority group’s candidate, though such districts create some “risk that a minority group’s preferred candidate may lose.”²¹³ Coalition districts, therefore, allow for more “substantive” minority representation because a larger number of districts might be created that would allow minority voters to coalesce with non-minority voters in order to achieve the electoral aspirations of the minority group.²¹⁴ The bottom line being that Section 5 leaves States with the “flexibility to choose one theory of effective representation over another.”²¹⁵

The second part of the analysis encompasses a hodgepodge of factors, including a comparative (between the existing and proposed plan) assessment of “influence” districts, what incumbent minority legislators think of the new plan, and whether the plan maintains or increases legislative positions of power for those minority legislators.²¹⁶ Thus, in assessing retrogression, one must look at whether the “new plan adds or subtracts ‘influence districts’ where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process.”²¹⁷ And, to assess the “comparative weight of these influence districts, it is important to consider ‘the likelihood that candidates elected without decisive minority support would be willing to take the minority’s interests into account.’”²¹⁸

211. *Id.* at 480 (defining a safe district as one where “it is highly likely that minority voters will be able to elect the candidate of their choice”).

212. *Id.* at 481.

213. *Id.* The Court defined a coalition district as a “district[] in which it is likely—although perhaps not quite as likely as under the benchmark plan—that minority voters will be able to elect candidates of their choice.” *Id.* at 480.

214. *Id.* at 481. As the Court noted:

[T]here are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice. Those candidates may not represent perfection to every minority voter, but minority voters are not immune from the obligation to pull, haul, and trade to find common political ground, the virtue of which is not to be slighted in applying a statute meant to hasten the waning of racism in American politics.

Id. (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994)).

215. *Georgia*, 539 U.S. at 482; *see also id.* at 480 (“Section 5 does not dictate that a State must pick one of these methods of redistricting over another.”).

216. *Id.* at 482-85.

217. *Id.* at 482.

218. *Id.* (quoting *Thornburg v. Gingles*, 478 U.S. 30, 100 (1986) (O’Connor, J., concurring)).

In fairness, it is difficult to clearly distinguish between a “coalition” district and an “influence” district. In a coalition district, minority voters combine with non-minority voters to elect a candidate of the minority voters’ choice. *Georgia*, 539 U.S. at 481. In an “influence district,” minority voters

The support of incumbent minority legislators, and the protection of those legislators, also plays a "significant, though not dispositive" role in assessing whether a plan diminishes the minority group's opportunity to participate in the political process.²¹⁹ If minority legislators support the plan, then that provides evidence that the proposed plan continues to ensure the same amount of minority participation in the political process as the existing plan.²²⁰ This results from incumbent legislators' knowledge of voting patterns and whether the proposed plan, when combined with those patterns, will lead to a decrease in minority voters effective exercise of the electoral franchise.²²¹

Finally, one must consider the "comparative positions of legislative leadership, influence, and power" for legislators in the existing plan's majority-minority districts when determining whether the proposed plan reduces the minority group's ability to participate in the political process.²²² One must examine whether the proposed plan retains those districts that

can play "a substantial, if not decisive, role" but cannot elect a candidate of choice. *Id.* at 482. But if minority voters play a decisive role then that means they are electing a candidate of choice, right?

My guess is that the difference lies more with electoral outcomes for candidates who are of the same race or ethnicity as the minority voters in the district. In an influence district, a non-minority candidate (i.e., a candidate who is not a member of a minority group) will virtually always be victorious, but will get decisive support from minority voters. *Id.* In a coalition district, a non-minority candidate and a minority candidate will both have a decent chance to win an election. *Id.* at 481.

This view seems consistent with the comments of Professor Richard H. Pildes in an article that was favorably mentioned by the *Georgia Court*. *Id.* at 482-83. Professor Pildes wrote:

This Article will assume for now, consistent with the emerging data, that black candidates can be regularly elected, at least in some places, from "coalitional" rather than "safe" majority-black districts. By "coalitional" districts, I mean ones in which the black registered voter population is less than 50% (typically 33%-39%) and the rest of the registered voters are non-Hispanic whites. I treat this as a distinct conceptual category of district, one that differs from safe districts and from "influence districts." Influence districts, debated in the 1990s but not legally required, are ones "in which a minority group has enough political heft to exert significant influence on the choice of candidate though not enough to determine that choice." The concept of influence is nebulous and difficult to quantify. In contrast, coalitional districts do not present these same difficulties. A coalitional district is defined in terms of actual electoral outcomes; such a district can be specified quantitatively as a district with a significant presence, though not a majority, of black voters, but that has a fifty-fifty probability of electing the preferred candidate of those black voters. Coalitional districts require, by definition, interracial support to elect a candidate that the black community prefers. Safe districts differ on this front because voters of a single race—minority voters—constitute a voting-eligible majority. If the black community prefers a black candidate in such a district, that candidate can be elected without any white support.

Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1539-40 (2002) (footnotes and quotations omitted).

219. *Georgia*, 539 U.S. at 483-84.

220. *Id.*

221. *Id.*

222. *Id.* at 482.

have resulted in the election of the most powerful minority legislators.²²³ For example, one would examine whether the proposed plan protected minority legislators who chaired committees. If the proposed plan retains those legislative positions of power, that evinces a lack of retrogression.²²⁴

C. The Supreme Court's (Rough) Application of Its New Standard

After setting forth this new framework for retrogression, the Court provided a crude application of its new standard to the Georgia State Senate plan. The Court criticized the district court for failing to consider all the relevant factors in determining whether the plan was retrogressive,²²⁵ faulting the district court's narrow focus on reductions of minority populations in "safe" districts while ignoring increases in African-American voting age population in other districts.²²⁶ In addition, the district court was faulted for ignoring the support of minority legislators and the impact the new plan had on maintaining those legislators' influence.²²⁷

The Court criticized the district court for not taking a broad view of the various increases and decreases in African-American population in the plan as a whole.²²⁸ This criticism proceeded along two lines—one quantitative, the other qualitative. The quantitative aspect of this criticism centered on the district court's narrow focus on three districts in which it was "marginally less likely that minority voters [could] elect a candidate of their choice" while "ignor[ing] the evidence of numerous other districts showing an increase in black voting age population."²²⁹ For example, using 2000

223. *Id.* at 483.

224. *Id.* at 483-84 ("Maintaining or increasing legislative positions of power for minority voters' representatives of choice, while not dispositive by itself, can show the lack of retrogressive effect under [Section] 5."). There may also be another level of analysis regarding preservation of minority legislators' power. This additional level of analysis may focus upon whether the plan represents an overall attempt to retain majority power for the political party to which the powerful minority legislators belong. For example, it may be permissible to reduce the level of minority voting strength in the district of a powerful minority legislator if that reduction enables the election of other members of the minority legislators' political party. Put more concretely, it may be permissible to reduce the electoral chances of a Democratic African-American House Majority Leader if that reduction is used to bolster the election of Democrats elsewhere who will enable the African-American majority leader to retain that powerful legislative status.

225. *Id.* at 485 ("The District Court failed to consider all the relevant factors when it examined whether Georgia's Senate plan resulted in a retrogression of black voters' effective exercise of the electoral franchise.").

226. *Id.*

227. The Court summarized the district court's mistakes as:

First, while the District Court acknowledged the importance of assessing the statewide plan as a whole, the court focused too narrowly on proposed Senate Districts 2, 12, and 26. It did not examine the increases in the black voting age population that occurred in many of the other districts. Second, the District Court did not explore in any meaningful depth any other factor beyond the comparative ability of black voters in the majority-minority districts to elect a candidate of their choice. In doing so, it paid inadequate attention to the support of legislators representing the benchmark majority-minority districts and the maintenance of the legislative influence of those representatives.

Id. at 485-86.

228. *Id.* at 486.

229. *Id.* at 485-86.

Census data, the number of African-American majority voting age population districts increased by one, the number of districts with between 30% and 50% African-American voting age population increased by two, and the number of districts with between 25% and 30% African-American voting age population increased by two.²³⁰ So, in the Court's view, the district court failed to consider whether decreases in "safe" districts were offset with increases elsewhere.²³¹

The qualitative criticism emanated from the district court's failure to properly credit the "other evidence that Georgia decided that a way to increase black voting strength was to adopt a plan that 'unpacked' the high concentration of minority voters in the majority-minority districts."²³² The Court took note of the plan's creators' "strategy", which was to "unpack[] minority voters in some districts to create more influence and coalitional districts."²³³ Indeed, this "goal" of unpacking minority voters was intended to "increase blacks' effective exercise of the electoral franchise in more districts."²³⁴

The Court also emphasized the relevance of minority legislators' views of the plan and the potential of the proposed plan to maintain or enhance minority legislators' positions of power.²³⁵ Thus, the Court favorably viewed the testimony of Senator Robert Brown, an African-American legislator who helped devise the proposed plan, who averred that the plan's goal was to maintain or increase black voting strength and, relatedly, the strength of the Democratic Party majority in the Senate.²³⁶ Also favorably viewed was the testimony of a civil rights legend, Congressman John Lewis, who said that the proposed plan enhanced African-American power by putting Democratic legislators into office who would be responsive to

230. *Id.* at 487. The Court noted that the increases in African-American voting age population would be even greater if the proposed plan was compared to the existing plan using 1990 Census data. *Id.* Under this comparison, the proposed plan increased the number of African-American voting age majority districts by three, and increased by five the number of districts with African-American voting age populations between 30% and 50% by five. *Id.* In fact, applying the 1990 Census data to Senate Districts 2, 12, and 26, showed that District 2 dropped from about 59% African-American voting age to just over 50%; District 26 dropped from about 53% to about 51%; and District 12 actually increased from about 47% to about 51%. *Id.*

It is unclear why the Court included a comparison with 1990 Census data as the Court recognized that the comparison between the proposed plan and the existing plan uses the most recent Census statistics. *Id.* at 506. My guess is that the review of 1990 data provides just another factor to use in the "totality" analysis.

231. *Id.* at 487 ("And regardless of any potential retrogression in some districts, [Section] 5 permits Georgia to offset the decline in those districts with an increase in the black voting age population in other districts.").

232. *Id.* at 486.

233. *Id.* at 487.

234. *Id.* at 488-89 (emphasis added).

235. *Id.* at 482-85.

236. *Id.* at 489.

African-American voters' concerns.²³⁷ Such testimony, in the Court's mind, enhanced the potential for finding that the proposed plan merited federal approval.²³⁸

But this application of the new retrogression test was merely rough, not decisive. While the Court wrote that Georgia's Senate plan was "likely" entitled to federal approval, the Court declined to finally resolve the case in favor of the State.²³⁹ Instead, the Court remanded the case so that the district court could conduct a more thorough analysis of the plan under the new standard.²⁴⁰

IV. *GEORGIA* AS A SOLUTION FOR THE SEPARATION OF POWERS DEFICIENCIES OF SECTION 5

The Section 5 effects test had separation of powers problems under the Court's recent decisions because it resulted in a wholesale change of the constitutional standard for voting discrimination from a purpose test to a pure effects test. *Georgia*, however, has shifted Section 5 away from a singular focus on discriminatory effects.²⁴¹ No, retrogression has not been morphed into a constitutional purpose test, but *Georgia* does move the Section 5 retrogression test close enough to the constitutional standard to eliminate any separation of powers problem. While nowhere in *Georgia* does the Court explicitly state an intent to move the retrogression standard toward compliance with its recent precedents limiting the scope of Congress's enforcement power, the opinion provides ample evidence for this view. Namely, the *Georgia* Court:

1) finds as relevant to retrogression, evidence that seems more germane to an analysis of discriminatory purpose rather than discriminatory effect;²⁴²

237. *Id.*

Congressman Lewis testified that "giving real power to black voters came from the kind of redistricting efforts the State of Georgia has made," and that the Senate plan "will give real meaning to voting for African Americans" because "you have a greater chance of putting in office people that are going to be responsive."

Id.

238. *Id.* at 489-90.

239. *Id.* at 487 ("Given the evidence submitted in this case, we find that Georgia likely met its burden of showing nonretrogression."); *see also id.* at 489 ("Other evidence supports the implausibility of finding retrogression here.").

240. *Id.* at 491 (remanding to the district court to examine the facts under the new retrogression test). The case was ultimately dismissed as moot because Georgia's plans were found to be in violation of the constitutional mandate of one person, one vote. *Larios v. Cox*, 300 F. Supp. 2d 1320, 1324-25, 1357-58 (N.D. Ga. 2004) (holding that Georgia's statewide plans violated one person, one vote).

241. *Georgia*, 539 U.S. at 484.

242. *Georgia*, 539 U.S. at 484.

2) explicitly places value on the motive and purpose of Georgia's legislators when discussing whether the Senate plan meets the new retrogression standard;²⁴³ and

3) establishes a totality of the circumstances test for Section 5, thus creating an analogy to the totality of circumstances test for Section 2,²⁴⁴ the latter of which appears to be constitutional, even after the Court's recent decisions.

A. The Structure of the New Retrogression Test and the Court's Rough Application of that Test to Georgia's Senate Plan

Some of the evidentiary factors that *Georgia* adds to the retrogression test look more like factors that would help to determine whether a discriminatory purpose was at work. The new retrogression standard starts with an inquiry into whether minority voters retain the ability to elect a candidate of choice in either a "safe" or "coalition" district.²⁴⁵ Nothing much new here. The Section 5 effects test, as historically applied by the Attorney General, previously looked at these types of districts to the exclusion of other factors.²⁴⁶ But all the other additional circumstances to consider—minority legislators' views of the proposed plan, an analysis of influence districts, and maintenance of minority legislators' power—appear to be an attempt to determine whether the voting change does something more than just result in a statistically provable discriminatory effect.²⁴⁷

The consideration of the views of minority legislators is the new factor that most clearly seems to put an element of purpose into the Section 5 effects test. After all, the *Georgia* district court had rejected the support of minority legislators as evidence of non-retrogression because that support provided an indication as to whether the plan was adopted with a discriminatory *purpose* rather than whether the plan was adopted with a

243. *Id.* at 503.

244. *Id.* at 480.

245. *Id.*

246. The only potentially new wrinkle on this front is the question of how fungible "safe" and "coalition" districts are. Federal approval has traditionally been denied when a state or local government reduces a "safe" district to a "coalition" district. *Session v. Perry*, 298 F. Supp. 2d 451, 479 (E.D. Tex. 2004) (three-judge panel) (recognizing that "Georgia's alteration of its safe districts would have been problematic at best in the 1980s and early 1990s."). In other words, federal approval has been denied when a district goes from virtually guaranteeing the election of minority voters' candidate of choice to a district in which there is a risk minority voters' candidate of choice might lose. It remains unclear whether moving one safe district to a coalition district will prove an impermissible retrogression. Put a bit differently, if a state or local government down-grades a safe district to a coalition district, does it have to create at least one additional coalition district or several additional influence districts in order to comply with the new retrogression test?

247. *Georgia*, 539 U.S. at 485-86.

discriminatory effect.²⁴⁸ Indeed, if the effect of a plan on minority voting strength is all that matters, minority legislators' support or opposition should generally not matter. Statistical analysis provides all the evidence needed except perhaps in close cases or where statistical analysis cannot be performed. But pure statistics do not explain the legislative process and the motives of elected officials; the views of minority legislators do explain those things. And widespread minority support for the change seemingly gives an imprimatur that purposeful discrimination was not at work in the adoption of the voting change.²⁴⁹

The inquiry into "influence" districts also contains an element that seems to be a search for discriminatory purpose. At first glance, though, this is not self-evident because influence districts might seem to be just a straight effects test search for whether the minority population has increased or decreased in districts that contain a critical mass of minority voters but do not contain enough minority voters to provide any reasonable opportunity to elect a candidate of choice.²⁵⁰ However, the review of influence districts involves more than just a search for whether the numbers have gone up or down.²⁵¹ It involves an inquiry into whether legislators elected from those districts will take into account minority interests.²⁵² Considered another way, the inquiry into influence districts will look to whether candidates actively seek minority votes and, more importantly, after seeking those votes, whether the candidates assist their minority constituents or vote in favor of issues minority voters overwhelmingly support.²⁵³ In essence, this amounts to a purpose-type analysis because it will look at whether legislators elected with minority support are just using those voters to get elected without providing some tangible benefits once assuming office.²⁵⁴

The role of minority legislators in adopting the voting change also contains elements of a purpose-type inquiry. The new test puts emphasis on retaining the ability of minority legislators to "pull, haul, and trade" in the political process and to exert their legislative influence.²⁵⁵ *Georgia* never explicitly ties this idea of participation in the political process to the adoption of the voting change itself, but it is probably not too great a stretch to read the opinion this way.²⁵⁶ So, when minority legislators have an active

248. See *supra* note 197 and accompanying text.

249. Of course, the absence of a discriminatory purpose cannot be completely proven because legislators elected from "safe" districts approved of the change. See, e.g., *Castaneda v. Partida*, 430 U.S. 482, 499 (1977) ("Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one [identifiable] group will not discriminate against other members of their group."). These legislators could just act in their own self-interest without concern for their minority constituents.

250. *Georgia*, 539 U.S. at 487 (citation omitted).

251. See *supra* note 218 and accompanying text.

252. See *supra* note 218 and accompanying text.

253. See *supra* note 218 and accompanying text.

254. *Accord City of Mobile v. Bolden*, 446 U.S. 55, 73-74 (1980) (plurality opinion) (describing how elected officials' discrimination against minorities in municipal employment and the dispensing of public services could amount to an unconstitutional discriminatory purpose).

255. *Georgia*, 539 U.S. at 483.

256. See *id.*

hand in pulling, hauling, and trading during the redistricting process and in cutting the political deals, then that serves as evidence a redistricting plan does not retrogress minority voting strength. However, if the redistricting process excludes minority legislators, then that would tend to provide evidence that the plan does retrogress minority voting strength and was intended to discriminate against minority voters.²⁵⁷

Of course, all these factors arguably are measurable in the same way the old retrogression test measured whether minority voters could elect candidates of choice from “safe” and “coalition” districts by focusing on the prevalence of racial bloc voting and the existence of a viable remedy.²⁵⁸ Influence districts can be measured by the increases or decreases in minority percentage; the responsiveness of legislators elected from influence districts can be measured by an analysis of legislative voting records; the support of minority legislators can be measured by reviewing the roll call vote on the voting change; and minority legislators’ positions of power can be measured by the likelihood of them being safely returned to office.

But these new factors are not so easily measured, and this fact has been pointed out by others.²⁵⁹ Moreover, even if each of the factors is measurable to some extent, it is unclear how these factors inter-relate in the ultimate “totality of the circumstances” finding. For example, what if minority legislators overwhelmingly support a plan that results in the loss of a safe district with no corresponding gain in coalition or influence districts? Or, what if all the safe districts are retained, influence districts are obliterated, and minority legislators overwhelmingly oppose the plan? Obviously, the possible iterations are endless. Thus, even assuming each factor to be empirically measurable, the ultimate totality calculation will be inherently unempirical.²⁶⁰

257. *Busbee v. Smith*, 549 F. Supp. 494, 518 (D.D.C. 1982) (three-judge panel) (finding discriminatory purpose in part because “[b]lack[s], solely because of their race, were excluded from the final [legislative] decision-making process”).

258. See *supra* Part I.A.

259. DANIEL HAYS LOWENSTEIN & RICHARD L. HASEN, *ELECTION LAW* 33 (2d ed. Supp. 2004).

The new standards set forth in [*Georgia*] . . . involve measuring things for which either (1) there are no hard data (e.g., how much influence does a majority-minority member have in a legislature?) or (2) no data at all (e.g., did the state decide to decrease the number of majority-minority districts because it had adopted a particular theory of representation or because it wanted to discriminate against minority voters?).

Id.; Pildes, *supra* note 218, at 1539 (describing the concept of the influence district as “nebulous and difficult to quantify”).

It is also worth mentioning that some of these factors may be unique to statewide redistricting plans where there are many different types of districts. County, city, and school district plans are less likely to have substantial numbers of “safe,” “coalition,” or “influence” districts. In fact, many of these plans are likely to have nothing more than one or two “safe” districts.

260. See *Georgia*, 539 U.S. at 494 (Souter, J., dissenting) (arguing that the majority opinion creates a standard for retrogression that is “practically unadministrable”).

So the new retrogression test now facially features an examination of factors that are unquantifiable and that seem to be searching for indicia of discriminatory purpose as well as discriminatory effect.²⁶¹ That provides evidence, albeit inconclusive, that the Section 5 effects test has shifted to something closer to a discriminatory purpose-type inquiry. However, this evidence becomes less inconclusive upon consideration of the Court's explicit invocation of motive in its rough application of the new test to Georgia's Senate plan.²⁶²

The motive of the decision-makers who created the Georgia Senate plan figures prominently in the Court's rough assessment of whether the Senate plan violated the Section 5 effects standard.²⁶³ The Supreme Court chided the lower court for ignoring evidence that Georgia's lawmakers decided to increase African-American voting strength by adopting a plan that unpacked high concentrations of minority voters.²⁶⁴ Aside from an explicit invocation of the motive behind the plan, the Court's analysis, thus, appears to elevate intangible motives over more provable statistical impact because there may not be any room to second-guess this decision. Motive matters because the decision of Georgia's lawmakers seems to matter in-and-of itself regardless of whether the facts on the ground would show that, in practice, minority voters lost traction in some districts.²⁶⁵

Even more directly, the Court's analysis of the Senate plan emphasized the importance of the Georgia lawmakers' "goal" in creating the plan.²⁶⁶ As the Court noted:

The testimony from those who designed the Senate plan confirms what the statistics suggest—that Georgia's *goal* was to "unpack" the minority voters from a few districts to increase blacks' effective exercise of the electoral franchise in more districts. These statistics also buttress the testimony of the designers of the plan such as Senator Brown, who stated that the *goal* of the plan was to maintain or increase black voting strength and relatedly to increase the prospects of Democratic victory.²⁶⁷

261. *Georgia* probably only represents the beginning of the new retrogression test. It is the first case to explicate the new standard and this new standard was not proffered in any party's brief to the Supreme Court. It seems likely then that, by creating a totality test, the Court has issued an invitation to the Attorney General and the covered jurisdictions to put other types of relevant evidence into play.

262. *See id.* at 484-88.

263. Pamela S. Karlan, *Georgia v. Ashcroft and the Retrogression of Retrogression*, 3 ELECTION L.J. 21, 35 (2004) ("The linchpin of the Court's analysis of the Georgia plan was not a prediction about election results at all, but rather its repeated assertion that Georgia had acted in good faith.").

264. *Georgia*, 539 U.S. at 486-87.

265. *See id.* at 487.

266. *Id.* at 488-89.

267. *Id.* (emphasis added).

The importance of the “goal” of the legislature also was underscored in the Court’s statement of the case’s facts.²⁶⁸

With these statements, the Court seems to be looking at motive in order to determine whether the plan retrogresses minority voting strength. Crediting several times over the non-discriminatory “goal” of Georgia’s African-American and white lawmakers to maintain or increase African-American voting strength seems indistinguishable from crediting them with adopting a plan that was free of discriminatory purpose or motive. Indeed, if Section 5 were still an effects only test, why would the “goal” matter? An effects test determines statistically whether or not the proposed plan was worse; as such, an inquiry into the legislature’s “goal” would be pointless to a pure analysis of discriminatory effects.

In fairness, the Court never explicitly endorses discriminatory purpose as a factor to consider in its new retrogression test.²⁶⁹ And advocates for minority voters who fear the insertion of any constitutional purpose-type evidentiary standard into the Section 5 effects test would surely counter that the Court cannot be adding, through *Georgia*, an element of discriminatory purpose when just a few years ago the Court explicitly removed discriminatory purpose as a basis for denying federal approval to a voting change.²⁷⁰ For this reason, interpreting *Georgia* as adding an element of purpose back into Section 5 squarely places it at odds with recent Court precedent.²⁷¹

As a matter of logic and policy, this argument makes eminent sense. If discriminatory purpose has been deemed an irrelevant ground for denying federal approval, then evidence of a lack of discriminatory purpose should be an equally irrelevant ground for granting federal approval. It would be seemingly inconsistent to allow evidence of motive to operate as a one-way ratchet that always works in favor of state and local governments, not to mention that using motive in this manner would seem to be unfair to minority voters.²⁷²

268. *Id.* at 469 (“The goal of the Democratic leadership—black and white—was to maintain the number of majority-minority districts and also increase the number of Democratic Senate seats.”); *Id.* (“The Vice Chairman of the Senate Reapportionment Committee, Senator Robert Brown, also testified about the goals of the redistricting effort.”) (emphasis added in both).

269. *See id.* at 488-89.

270. *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000); *see also* Karlan, *supra* note 263, at 35 (“The Court’s opinion seemed to reimport into the section 5 inquiry the kind of free-floating inquiry into legislative intent that *Reno v. Bossier Parish School Board* (Bossier II) had sought to eliminate.”) (footnote omitted).

271. *Compare Georgia*, 539 U.S. at 487, with *Bossier Parish Sch. Bd.*, 528 U.S. at 341.

272. One way for the Court to explain this inconsistency logically would be for the Court to adopt the thesis of this Article. Namely, that the Section 5 effects test would be unconstitutional without moving it closer to the constitutional purpose standard. However, that still does not really explain why the Court would have removed discriminatory purpose as a means for denying preclearance because leaving that standard in Section 5 would not have called into as much question the constitutionality of the statute. My suspicion is that the Court probably would not object to a statute

But in the real world, logic does not govern, judges do. And the current legal reality consists of a federal judiciary led by a Court majority that has a low tolerance for race-based remedies and a low tolerance for federal laws that dictate what states must do. Of course, Section 5 touches squarely upon both of these concerns, making it the quintessential statute for the current Court to take aim at. So, in the real world, it makes perfect sense for the Court to issue two decisions just a few years apart that are incongruous in their treatment of evidence (or lack thereof) of discriminatory purpose.²⁷³ The cases can easily be synthesized because both decisions make it more difficult for the federal government to force state and local officials to engage in race-conscious redistricting.

Aside from arguing that the Court should not re-insert a purpose test to the disadvantage of minority voters when it recently removed a purpose test that was advantageous to minority voters,²⁷⁴ advocates for minority voters might take exception to the insertion of any whiff of a purpose standard into the Section 5 effects test on a plain language theory. Congress wrote a statute outlawing discriminatory effects in voting in certain jurisdictions and the plain language of the statute must be respected.²⁷⁵ The Court should not re-fashion the statutory language in a manner not intended by Congress.

As a matter of pure statutory interpretation and due deference for the judgment of Congress as a co-equal branch of government, advocates for minority voters would likely be correct. Congress created an effects test in a day-and-age when it appeared the Court was willing to cede such power to Congress and the Court should probably respect Congress's judgment and reliance on prior Court precedent.²⁷⁶ However, interpreting Section 5 so literally could have serious negative long-term consequences for minority voters because a literal interpretation of the statute might make it unconstitutional under the recent Court doctrine.²⁷⁷ Voting rights advocates

that provided a standard that allowed a federal court or the Attorney General to deny preclearance when a change was made with an unconstitutional purpose, but that a majority of the Court believed the Attorney General was not actually implementing a purpose standard but was instead engaging in an analysis that sought to maximize black voting strength. See *Miller v. Johnson*, 515 U.S. 900, 924-27 (1995) (criticizing the Attorney General's "policy of maximizing majority-black districts"); *Shaw v. Hunt*, 517 U.S. 899, 913 (1996) (criticizing the Attorney General's "policy of maximizing majority-black districts"); Katz, *supra* note 159, at 1180-81 (stating that "the Bossier Parish cases may best be seen to reflect the Court's concern about institutional overreaching by the Department of Justice (DOJ) . . . [as the] Rehnquist Court has long been convinced that DOJ has systematically abused its authority in the preclearance process . . .").

273. Compare *Georgia*, 539 U.S. at 487, with *Bossier Parish Sch. Bd.*, 528 U.S. at 341.

274. See *supra* notes 83-88 and accompanying text (describing how the purpose test resulted in the elimination of dilutive electoral systems).

275. 42 U.S.C. §1973 (2000). Steve Pershing has criticized federal courts that seem to take a similar approach to Section 2 (i.e., courts that seem to be inserting a purpose standard into the Section 2 "results" test). Stephen B. Pershing, *The Voting Rights Act in the Internet Age: An Equal Access Theory for Interesting Times*, 34 LOY. L.A. L. REV. 1171, 1195-97 (2001).

276. See *Primus*, *supra* note 165, at 495-96 (describing how, in the mid-1970s, the Court implied "that Congress could use disparate impact standards in antidiscrimination statutes if it so chose").

277. In a way, adding an element of purpose to the Section 5 effects test amounts to the Court's reinterpretation of the statute to avoid a constitutionally suspect interpretation. See *Lopez v. Monterey County*, 525 U.S. 266, 293 (1999) (Thomas, J., dissenting) ("[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise

might want to be wary of winning the statutory interpretation battle and losing the constitutionality war.²⁷⁸

and by the other of which such questions are avoided, our duty is to adopt the latter'') (quoting *United States ex rel. Attorney Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909)).

278. Perhaps, though, the *Georgia* test has little to do with racial motive, but instead is just about keeping the judiciary out of the political process and the federal government out of the business of state and local governments. Put another way, maybe the Court does not care about moving Section 5 toward the constitutional purpose standard but instead is animated more by the idea of extracting the federal judiciary from the "political thicket" and the federal government from the political processes of states. *Colgrove v. Green*, 328 U.S. 549, 556 (1946).

Letting the state political process play itself out without interference from the federal courts or the Attorney General certainly influences much of the Court's voting rights jurisprudence over the last decade or so. See *Vieth v. Jubelirer*, 124 S. Ct. 1769 (2004) (plurality opinion) (declining to allow the federal judiciary to find redistricting plans to be unconstitutional partisan gerrymanders); compare *Shaw v. Hunt*, 517 U.S. 899 (1996) (denying the State the ability to create a district that lets minority voters elect a candidate of choice when it was drawn after Attorney General's denial of approval of redistricting plan), with *Easley v. Cromartie*, 532 U.S. 234 (2001) (allowing the State to create a district that lets minority voters elect a candidate of choice when no interference by Attorney General); see also Melissa L. Sanders, *A Cautionary Tale: Hunt v. Cromartie and the Next Generation of Shaw Litigation*, 1 ELECTION L.J. 173, 188 (2002) (describing how the Court's decision in *Cromartie* came in a context that was "substantially different" because the districting plan was not drawn to comply with the Department of Justice's so-called "maximization policy"). So maybe *Georgia* should be viewed more as a federalism or political question decision.

While undoubtedly these motivations played some role in *Georgia*, I think the opinion has more to do with a substantive interpretation of what constitutes racial discrimination rather than federalism or political question concerns. This is because *Georgia* does not greatly limit the power of the Attorney General or the D.C. District Court to deny preclearance of a voting change because few changes actually end up being rejected by those entities. Compare *supra* note 102 (noting that during a four-year period the Attorney General interposed only 34 objections), with http://www.usdoj.gov/crt/voting/sec_5/changes_00s.htm (last revised July 1, 2004) (listing the tens of thousands of changes reviewed by the Attorney General during that time period).

One other word about politics here. The Court's test seems to provide "flexibility" for each major political party to get federal approval of a statewide redistricting plan. See *supra* note 16 (discussing the "flexibility" that the retrogression test allows states). As Professor Pamela S. Karlan has observed:

Democratic incumbents and party officials advance, although they do not call it this, a governance-driven model of minority voting rights: They claim that blacks and (at least some) Hispanics would maximize their voting strength by seeking legislatures whose overall composition is most favorable to minority [voting] interests (*i.e.*, majority-Democratic bodies). This can best be accomplished by drawing districts in which minority voters contribute to the victory base of a broad range of (largely white) Democratic candidates. Recently, Republicans have countered with an exclusively aggregation-driven model. They claim that minorities are best off when they can elect individual candidates of their choice from districts where they control, rather than influence, outcome [*sic*]. Like the Democratic model, which is aimed at creating Democratic-controlled bodies, the Republican model will, the Republicans hope, lead to Republican-controlled legislatures.

Karlan, *supra* note 81, at 1708. *Georgia* seems likely to allow Republicans to continue their strategy of creating the same number or an additional number of "safe" seats while reducing minority voting strength in "coalition" and "influence" districts. In turn, Democrats will be allowed to weaken some "safe" districts in order to give minority voters greater voice through "coalition" and "influence" districts.

B. The Totality of the Circumstances Test

While the individual elements of the new retrogression test evince a movement toward the constitutional purpose standard, so does the overall characterization of the test as a “totality of the circumstances” inquiry.²⁷⁹ Creation of a totality test arguably marks a move toward the constitutional purpose standard for one obvious reason: it means that, by definition, retrogression no longer amounts to just a discriminatory impact test. Using a phrase like the “totality of the circumstances” to describe the Section 5 effects standard thus provides more wiggle room for proponents of the statute’s constitutionality to argue that the retrogression standard looks at a host of factors aside from pure discriminatory effect.

In a way, using the totality of the circumstances for the Section 5 effects test moves it somewhat closer to the manner in which the Court generally reviews claims of racial discrimination under the Equal Protection Clause²⁸⁰ — by examining the impact of the governmental action on minority persons in conjunction with a host of different factors that might (or might not) provide circumstantial evidence of the existence of a discriminatory purpose.²⁸¹ With this type of analysis of circumstantial evidence of purpose being especially prevalent in constitutional voting cases where the Court seems more willing to find discriminatory intent from “an aggregate of factors having at best an indirect bearing on motivation.”²⁸²

In addition, the use of a totality test for Section 5 creates a symbiosis of language with another provision of the Voting Rights Act — the well-established totality of the circumstances standard from the Section 2 “results” test.²⁸³ As mentioned earlier, the “results” test primarily serves as a

279. *Georgia*, 539 U.S. at 480, 484.

280. *Washington v. Davis*, 426 U.S. 229, 242 (1976) (describing how discriminatory purpose may “be inferred from the totality of the relevant facts”).

281. To determine whether a government action was motivated by discriminatory purpose, one must make a “sensitive inquiry into such circumstantial and direct evidence of intent as may be available.” *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). Whether the action “bears more heavily on one race than another . . . provide[s] an important starting point” for discovering whether discriminatory purpose is at work. *Id.* (quoting *Davis*, 426 U.S. at 442). In addition, other factors to review include:

- 1) “[t]he historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes;”
- 2) “[t]he specific sequence of events leading up to the challenged decision;”
- 3) “[d]epartures from the normal procedural sequence . . . [and s]ubstantive departures . . . particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached;” and
- 4) “[t]he legislative or administrative history.”

Vill. of Arlington Heights, 429 U.S. at 267-68. This list, however, is not “exhaustive” of the factors that might be considered when making an inquiry into the presence or absence of discriminatory purpose. *Id.* at 268.

282. Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1127 (1989).

283. 42 U.S.C. § 1973 (2000). Section 2 reads as follows:

- (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section

means for attacking minority vote dilution,²⁸⁴ and the Section 2 “results” test also, at first glance, might appear to be a shift of the constitutional standard from a purpose test to an effects test.²⁸⁵ After all, looking to “results” would seem akin, at least semantically, to looking at “effects” or “impact.”²⁸⁶

Nonetheless, the federal courts have been unanimous in upholding the constitutionality of the Section 2 “results” test.²⁸⁷ Why have the federal courts proved such stalwart supporters of Section 2 — even after the Court’s recent pronouncements limiting Congress’s enforcement power?²⁸⁸ As a practical matter, circuit and district judges know how to count votes on the Supreme Court. With a Court very ideologically divided on issues of race and federalism, Justice Sandra Day O’Connor has become the all important swing vote that determines whether racial voting remedies stand or fall.²⁸⁹ Even though Justice O’Connor has not had the opportunity to cast a vote on the constitutionality of Section 2, she has strongly implied she would uphold that provision of the Voting Rights Act as a proper exercise of Congress’s enforcement power.²⁹⁰

1973(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Id.

284. See *supra* note 81 and accompanying text.

285. See Williamson, *supra* note 7, at 15-16 n.81 (“The 1982 amendment to [Section] 2 was for the express purpose of declaring the congressional intent that a violation of the statute could be established by showing the discriminatory effect of the challenged practice.”).

286. Granted, one could argue that because Congress used the term “results” instead of the term “effect,” Congress intended the term “results” to mean something different from the term “effect.”

287. *Bush v. Vera*, 517 U.S. 952, 991 (1996) (O’Connor, J., concurring) (listing circuit and district court cases upholding the constitutionality of Section 2).

288. See, e.g., *United States v. Blaine County*, 363 F.3d 897, 905 (9th Cir. 2004); *United States v. Alamosa County*, 306 F. Supp. 2d 1016, 1040 (D. Colo. 2004).

289. See Guard, *supra* note 107, at 359 (describing the constitutionality of Section 2 as “hinging on Justice O’Connor’s vote”); see also David S. Broder, *O’Connor’s Special Role*, WASH. POST, OCT. 1, 2003, at A23 (describing Justice O’Connor’s role as the “swing vote” on the current Court); Tony Mauro, *It’s a Mad, Mad, Mad, Mad Court*, TEX. LAW., July 7, 2003, at 12 (describing Justice O’Connor’s dominant role on the Court).

290. In *Bush*, Justice O’Connor took the unusual step of concurring in her own majority opinion. 517 U.S. at 990-95 (O’Connor, J., concurring). In that concurrence, she asserted that the “Supremacy Clause obliges the States to comply with all constitutional exercises of Congress’ power.” *Id.* at 991-92. Thus, the Court “should allow States to assume the constitutionality of [Section] 2 of the VRA.” *Id.* at 992. According to Justice O’Connor, this conclusion was:

... bolstered by concerns of respect for the authority of Congress under the Reconstruction Amendments. The results test of [Section] 2 is an important part of the apparatus chosen by Congress to effectuate this Nation’s commitment to confront its

Aside from this pragmatic approach lies a more principled reason to think Section 2 remains constitutional under the recent Court decisions — the Section 2 standard strongly resembles the constitutional standard for proving unconstitutional vote dilution.²⁹¹ The test for proving the unconstitutional establishment or maintenance of a dilutive voting system was last expounded upon by the Court in *Rogers v. Lodge*.²⁹² In *Lodge*, the Court noted “that discriminatory intent . . . may often be inferred from the totality of the relevant facts.”²⁹³ The Court then discussed what sort of evidence might serve as relevant facts, listing: (1) the minority voter registration rate; (2) the extent of racially polarized voting; (3) the electoral success of minority candidates; (4) the existence of past discrimination in the political process; (5) the existence of past discrimination in education and employment; (6) whether elected officials were unresponsive to minority constituents; (7) whether minority citizens suffer from a depressed socio-economic status; (8) the size of the area encompassed by an at-large district; (9) the legitimate state interest in using at-large elections; and (10) whether other discriminatory devices, such as numbered posts and a majority vote requirement, were used in the electoral system.²⁹⁴

Meanwhile, the test for proving that an electoral system dilutes minority votes in violation of Section 2 was principally delineated in *Thornburg v. Gingles*.²⁹⁵ In *Gingles*, the Court listed the following factors as relevant to the totality analysis: (1) a sufficiently large and geographically compact minority group that could form a majority population in a single-member district; (2) a politically cohesive minority group; (3) a majority group that votes as a bloc to usually defeat a minority group’s chosen candidates; (4) a history of discrimination in voting; (5) the extent to which discriminatory devices, such as numbered posts, majority-vote requirements, or unusually large election districts, have been used; (6) the exclusion of minority citizens from any candidate slating process; (7) a history of discrimination in education and employment; (8) the use of racial appeals during election campaigns; (9) the success of minority candidates; (10) the unresponsiveness of elected officials to minority constituents; and (11) the policy underlying the use of at large elections.²⁹⁶

conscience and fulfill the guarantee of the Constitution with respect to equality in voting. Congress considered the test necessary and appropriate to ensure the full protection of the Fourteenth and Fifteenth Amendments

Id. (internal quotations and citations omitted). In fairness, however, *Bush* does predate the recent Court decisions that scale back Congress’s enforcement power.

291. See James U. Blacksher & Larry T. Menefee, *From Reynolds v. Sims to City of Mobile v. Bolden: Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 HASTINGS L.J. 1, 32 (1982) (describing how difficult it is to distinguish the constitutional standard for vote dilution from the Section 2 results test).

292. 458 U.S. 613 (1982).

293. *Id.* at 618 (internal quotations omitted).

294. *Id.* at 623-27.

295. 478 U.S. 30 (1986).

296. *Id.* at 44-51 (plurality opinion).

As is apparent, the evidentiary factors considered under both the constitutional and statutory standards are nearly, though by no means precisely, identical.²⁹⁷ The main difference is that *Gingles* places a bit more emphasis on certain foundational factors, such as the ability of minority voters to comprise a majority of the population in a single-member district and racially polarized voting that results in the usual defeat of the preferred candidates of minority voters.²⁹⁸

What this all means for future constitutional challenges to the Section 5 retrogression test is this: if the “totality of the circumstances” Section 2 results test continues to be viable as a congressional remedy because it hews close enough to the constitutional standard previously handed down by the Court then, by analogy, the “totality of the circumstances” Section 5 effects test continues to be viable as a congressional remedy because it too hews close enough to the constitutional standard previously handed down by the Court.

But maybe the analogy only goes so far. The Section 2 totality test and the Section 5 totality test look at different evidentiary factors. And the Court has sought to keep the two standards at arms length.²⁹⁹ This is because of the differing purposes behind the two Voting Rights Act provisions: Section 5 works to prevent changes to the *status quo* that will make minority voters worse off while Section 2 works to remediate a dilutive *status quo*. Considered another way, the Court distinguishes between the two provisions to insure that Section 5 stays true to its “limited substantive goal.”³⁰⁰

However, these different purposes serve to explain why the evidentiary factors would be different.³⁰¹ Moreover, even though the Court has sought

297. Guard, *supra* note 107, at 359 (describing how there may not be a large tension between the Court’s idea of vote dilution in *Rogers* and Congress’s idea of vote dilution codified in Section 2). *Accord* United States v. Blaine County, 363 F.3d 897, 909-10 (9th Cir. 2004) (“In fact, calling section 2’s test a ‘results test’ is somewhat of a misnomer because the test does not look for mere disproportionality in electoral results. Rather, plaintiffs must establish that under the totality of the circumstances, the challenged procedure prevents minorities from effectively participating in the political process.”).

298. *Gingles*, 478 U.S. at 48-49 (plurality opinion) (allowing that election systems will generally not violate Section 2 unless a bloc voting majority usually defeats candidates supported by a minority group that is politically cohesive and geographically insular); *see also* Harvell v. Blytheville Sch. Dist. No. 5, 71 F.3d 1382, 1390 (8th Cir. 1995) (en banc) (“Satisfaction of the necessary *Gingles* preconditions carries a plaintiff a long way towards showing a Section 2 violation.”).

299. *Georgia v. Ashcroft*, 539 U.S. 461, 478 (2003) (“We refuse to equate a [Section] 2 vote dilution inquiry with the [Section] 5 retrogression standard.”); *see also* Holder v. Hall, 512 U.S. 874, 883 (1994) (plurality opinion) (describing how Sections 2 and 5 “differ in structure, purpose, and application”).

300. *Georgia*, 539 U.S. at 477.

301. For now, Section 2’s totality test arguably looks at more factors that appear to be an inquiry into purposeful discrimination than Section 5’s totality test. This makes sense because Section 5 involves a current change that has a discriminatory impact. In contrast, Section 2 often involves maintenance of an electoral system that has been implemented for many years and may have gradually resulted in a dilution of minority voting strength. Put differently, it would seem

to differentiate the two standards, the *Georgia* opinion, at one point, explicitly analogizes the two.³⁰² Finally, throughout the *Georgia* opinion, Justice O'Connor finds support for the majority position in the seminal Section 2 case, *Thornburg v. Gingles*,³⁰³ citing to that opinion eighteen times.³⁰⁴

C. Closer To, But Not Exactly, A Constitutional Discriminatory Purpose Test

While *Georgia* appears to solve Section 5's separation of powers problem, it is important to establish that, even though the retrogression test now more closely resembles a test that searches for a racially discriminatory purpose, the new retrogression test cannot be exactly equated with the constitutional purpose standard. This is because discriminatory effects still play a prominent, if no longer absolutely conclusive, role in the retrogression analysis. *Georgia* makes abundantly clear that the comparative "ability of minority voters to elect a candidate of their choice is an important one"³⁰⁵ and "remains an integral feature"³⁰⁶ of the retrogression analysis. So discriminatory effects still matter, and in no small way. Moreover, the Section 5 retrogression test does not include any ultimate finding of discriminatory purpose. This makes it easier to meet than the constitutional standard because the new retrogression test requires a lower quantum of circumstantial evidence from which to infer purpose and, in the real world, judges tend to be extremely cautious about labeling government officials as purposeful racial discriminators.³⁰⁷

reasonable to require less purpose-type evidence when the current governing body has taken direct recent action that will have a racially discriminatory impact, as opposed to the inaction of maintaining an electoral system that harms minority voters.

302. *Georgia*, 539 U.S. at 484 ("As Justice Souter recognized for the Court in the [Section] 2 context, a court or the Department of Justice should assess the totality of the circumstances in determining retrogression under [Section] 5.") (citing *Johnson v. De Grandy*, 512 U.S. 997, 1020-21 (1994)).

303. 478 U.S. 30 (1980).

304. Justice O'Connor cited to Justice Brennan's *Gingles* plurality opinion three times. *Georgia*, 539 U.S. at 478, 480, 485. She used fourteen cites to her *Gingles* concurrence. *Id.* at 478, 479-80, 480 (three citations), 482 (three citations), 483, 484, 485 (two citations), 489, 490.

305. *Id.* at 480.

306. *Id.* at 484.

307. As Professor Pamela S. Karlan has observed:

Judges, after all, often live in the same milieu as other public officials and far away from the plaintiffs who bring racial vote dilution lawsuits. If they are compelled to call their acquaintances evil in order to do justice, then they may find themselves tempted to shade their judgment in even remotely close cases.

Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 WM. & MARY L. REV. 725, 735 (1998).

A good example of a federal judge's discomfort with finding discriminatory purpose in a voting case can be found in a recent opinion that held Charleston County, South Carolina, in violation of Section 2 of the Voting Rights Act. The Court wrote:

... [T]his Order is radically not a condemnation of the citizenry of Charleston County but rather a recognition that the specific bulwark of an at-large system, in twisted concert with the particular geographic and historical realities of this County, unlawfully and

It might be argued that, despite *Georgia*, the Section 5 effects test remains a change of the constitutional standard that violates the Court's recent decisions. Why? Because one could contend that the Court's recent decisions prevent Congress from changing the constitutional standard one iota and that the Section 5 retrogression test still requires less than full-blown proof of a constitutional violation. But even the Court's recent cases have consistently recognized Congress's ability to go somewhat further than the constitutional standard.³⁰⁸ Congress, through legislation, can provide greater substantive protection for minority voters than would be provided by the Court - just not too much greater substantive protection, or at least not substantive protection that amounts to a complete and total reversal of a constitutional purpose standard.

One might also argue that the plain language of the statute amounts to a *per se* violation of the Court's doctrine by use of the word "effect."³⁰⁹ However, such a plain language argument would ignore the nuance of Section 5. Namely, how the *Beer* Court redefined the term "effect" to mean

institutionally inhibit a community of voters in Charleston County from equal access to the electoral process. The United States Supreme Court has made it clear that the "essence of a [Section] 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). In other words, a violation of Section 2 may arise from the structure of the electoral process itself plus the effects of *past* discrimination without regard to any *present* discriminatory intent. This case is one such instance.

Undoubtedly there are bigots among us, and while their stories uncomfortably texture the four corners of the Court's decision, this Order is little about them. If the trial on the merits demonstrated anything, it is that Charleston County can celebrate a rich legacy of individuals selflessly working towards a true community among its many races. Notwithstanding, the current at-large system, as it exists in a county of this size, unlawfully exacerbates the disadvantaged political posture inherited by generations of African-Americans through centuries of institutional discrimination.

United States v. Charleston County, 316 F. Supp. 2d 268, 271 (D.S.C. 2003).

308. See *Tennessee v. Lane*, 124 S. Ct. 1978, 1985 (2004) ("We have thus repeatedly affirmed that Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.") (internal quotes omitted); *Nevada Dept. of Human Res. v. Hibbs*, 538 U.S. 721, 727 (2003) ("Congress may, in the exercise of its . . . [enforcement] power, do more than simply proscribe conduct that we have held unconstitutional."); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001) ("Congress is not limited to mere legislative repetition of this Court's constitutional jurisprudence."); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 81 (2000) (quoting *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997)) ("Rather, Congress' power 'to enforce' the [Fourteenth] Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text."); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 638 (1999) (noting Congress's enforcement power allows for passage of statutes even if those statutes "prohibit[] conduct which is not itself unconstitutional"); *Boerne*, 521 U.S. at 518 (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)) ("Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'").

309. 42 U.S.C. § 1983 (2000).

“retrogression” and how the *Georgia* Court has further embellished upon the retrogression standard.³¹⁰ Moreover, Congress can most certainly, as a matter of linguistics, outlaw practices that have a discriminatory effect.³¹¹ In the final analysis, and what I argue here, is that a constitutional purpose test cannot be completely and wholly replaced by a “pure” statutory effects test, but rather any statutory effects test must work in practice to appear to be “smoking out” discriminatory purpose.

In sum, the new test for retrogression will likely to work as follows: when a voting change results in a small discriminatory effect, it will be granted preclearance unless strong evidence exists to demonstrate an improper motive; when a voting change results in a great discriminatory effect, it will be denied preclearance even if only a little evidence exists to demonstrate improper motive.³¹² And what does “evidence” of “improper motive” mean? It means circumstantial evidence that the reason for the change is pretextual or represents a tenuous governmental interest. In essence, this closely resembles how discriminatory purpose works in the real world. When a government action has a great disparate impact and a tenuous governmental interest, a plaintiff challenging that action needs to produce a lower quantum of circumstantial evidence to prove improper motive; but when a government action has a slight disparate impact and a legitimate governmental interest, a plaintiff must produce a greater quantum of circumstantial evidence (and maybe even, in such a case, direct evidence) to prove improper motive.³¹³

V. CONCLUSION

Georgia presents a whole host of issues and problems—far too numerous and complicated to adequately explore in any single article. *Georgia* could result in minority voters losing important power in state and local governments—power that has taken years of toil and struggle to obtain. And *Georgia* may create a standard for retrogression that the Attorney General and the federal courts will find impossible to administer in a consistent, predictable fashion. But despite the potential negatives the decision may have for minority voters, *Georgia* does bring Section 5 more into line with the Court’s idea of what constitutes a proper separation of powers when Congress exercises its enforcement power.

310. *Beer v. United States*, 425 U.S. 130, 141 (1976); *Georgia*, 539 U.S. at 479-85.

311. *Lane*, 124 S. Ct. at 1986 (“When Congress seeks to remedy or prevent unconstitutional discrimination, [Section] 5 [of the Fourteenth Amendment] authorizes it to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause.”).

312. When it is a close call and the evidence appears to be in equipoise, then federal approval should be denied because the submitting jurisdiction has the burden of proving the voting change complies with Section 5. See *supra* note 32 and accompanying text (describing burden of proof).

313. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. at 266 (“Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face.”).